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Aeyal Gross

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Article

Litigating the Right to Health under Occupation: Between Bureaucracy and Humanitarianism

Aeyal Gross*

INTRODUCTION

The increasing role of litigation in the protection of the right to health has evoked great interest in recent years.¹ In addition to the increase in domestic and international litigation,² the examination of access to health care from a human rights perspective is also clearly rising.³ This growing attention to

* Aeyal Gross is Professor of Law at Tel Aviv University. I am grateful to the World Health Organization for the funding for this research, to Dani Filc, Paul Hunt, Michal Luft, Yael Ronen, and Anita Vitullo for their comments on a previous draft of the article, and to Idan Seger for his excellent and dedicated research work. Special thanks to Physicians for Human Rights – Israel and especially to Mor Efrat for their help during the research. Special thanks to Batya Stein for her excellent editing work. Responsibility for all interpretations and translations of Israeli laws and cases remain with the author.

1. See *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Varun Gauri & Daniel M. Brinks eds., 2008); *LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH?* (Alicia Ely Yamin & Siri Gloppen eds., 2011); *THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY* (Colleen M. Flood & Aeyal Gross eds., Cambridge Univ. Press 2014) [hereinafter *THE RIGHT TO HEALTH*]; Colleen M. Flood & Aeyal Gross, *Litigating the Right to Health: What Can We Learn from a Comparative Law and Health Care Approach*, 16 *HEALTH & HUM. RTS. J.* 62 (2014); Aeyal Gross, *The Right to Health in an Era of Privatization and Globalization: National and International Perspectives*, in *EXPLORING SOCIAL RIGHTS: THEORY AND PRACTICE* 289, 291 (Daphne Barak-Erez & Aeyal Gross, eds., Hart Publishing, 2007) [hereinafter *The Right to Health in an Era of Privatization and Globalization*]; Hans V. Hogerzeil et al., *Is Access to Essential Medicines as Part of the Fulfillment of the Right to Health Enforceable Through the Courts?*, 368 *LANCET* 305 (2006); Symposium, *Legislating and Litigating Health Care Rights Around the World*, 33 *J. L. MED. & ETHICS* 636 (2005).

2. Regarding the right to health at the level of international law, see JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* (2012); JONATHAN WOLFF, *THE HUMAN RIGHT TO HEALTH* 94 (2012); Susan Marks & Andrew Clapham, *Health*, in *INTERNATIONAL HUMAN RIGHTS LEXICON* 197 (2005).

3. For a description of the processes involved in the growing turn to the

litigation has focused on access to health care within domestic settings, raising questions about the setting of priorities, rationing, decision-making, and so forth.

This Article looks at another context of litigation, involving residents of an occupied territory in the courts of law of the occupying power. Specifically, it considers the right to health of Palestinians from the Occupied Palestinian Territory (OPT) as discussed in Israeli courts, a setting distinct from the discussion in the current literature on health rights litigation—one that raises unique questions.

This Article begins with the frame of its discussion. First, the OPT is defined as including the West Bank and the Gaza Strip. After the Israeli “disengagement” in 2005, questions about the status of the Gaza Strip and whether it is still occupied have been a controversial subject. This Article uses the approach developed in the Author’s other writings: so long as Israel exercises even partial control over Gaza, it continues to be responsible as the occupier, at least functionally, for all matters over which it has control.⁴ As for East Jerusalem, although Israel has extended its law, administration, and jurisdiction to it,⁵ this unilateral annexation has not been internationally recognized and the area is considered part of the OPT, despite its *sui generis* situation as the only place in the OPT where Israeli law is applied to Palestinians. This Article will, therefore, address some cases regarding East Jerusalem, notwithstanding the different legal framework.

Even *within* the West Bank, however, the operation of the

right to health and the reasons for them, see Colleen M. Flood & Aeyal Gross, *Marrying Human Rights and Health Care Systems: Contexts for Power to Improve Access and Equity*, in *THE RIGHT TO HEALTH*, *supra* note 1, at 2–4.

4. For a detailed discussion of the debate regarding Gaza and for an elaboration of the functional approach, see AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 52–264 (2017). See also Aeyal Gross, *Rethinking Occupation: The Functional Approach*, *OPINIO JURIS* (Apr. 23, 2012), <http://opiniojuris.org/2012/04/23/rethinking-occupation-the-functional-approach>. The ICRC has recently adapted a limited version of a functional approach. Int’l. Comm. of the Red Cross [ICRC], *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, ¶¶ 116–23 (Mar. 22, 2016). See also (Re)-Introducing the Functional Approach to Occupation, *GAZA GATEWAY* (Dec. 15, 2015), <http://gisha.org/en-blog/2015/12/15/re-introducing-the-functional-approach-to-occupation/>.

5. See Law and Administration Order (no.1), 5727–1967, KT 2064 p. 2690 (Isr.). See also Basic Law: Jerusalem, Capital of Israel, 5740–1980, SH No. 980 p. 186. For a discussion, see EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, 203–06 (2012).

Palestinian Authority (PA) alongside Israel, the occupying power, complicates the situation. Health is one of the matters that are generally under PA jurisdiction. While his article does not deal with the period that preceded the Oslo Agreements (1967–1994) when Israel, as occupier, administered significant aspects of the health care system in the OPT directly,⁶ some of the patterns from that period, however, are still relevant and deserve mention. One is the creation of two different standards of care—one for Israeli settlers who have access to the Israeli health care system, and a separate, substandard for Palestinians in the OPT.⁷ In the latter, the emphasis is on access to public health and a certain level of primary care, with more expensive tertiary care provided by Israeli hospitals on a limited scale. This creates ongoing dependence on Israel for sophisticated forms of treatment. Since patients require the approval of the Israeli secret service to enter Israel for health care, the need to refer Palestinian patients for treatment to Israel has turned into an instrument of control for the occupation forces.⁸

The shift in the context of health is part of a more general shift in the patterns of the Israeli occupation in the wake of the Oslo accords—maintaining control while bearing less responsibility.⁹ Dani Filc, a politics and government professor at Ben-Gurion University of the Negev, points out the problematic nature of the agreement that transferred health care responsibilities from Israel to the PA.¹⁰ The PA was made responsible for health care, but Israel retained power and authority over elements crucial to it, such as freedom of

6. For a discussion of this period, see Neve Gordon & Dani Filc, *The Destruction of Risk Society and the Ascendancy of Hamas*, in *THE POWER OF INCLUSIVE EXCLUSION: ANATOMY OF ISRAELI RULE IN THE OCCUPIED PALESTINE TERRITORIES* 457, 461–66 (Adi Ophir et al. eds., 2009); Yithak Sever & Yitzhak Peterburg, *Israel's Development and Provision of Health Services to the Palestinians in the West Bank and Gaza, 1967-1994*, in *SEPARATE AND COOPERATE, COOPERATE AND SEPARATE: THE DISENGAGEMENT OF THE PALESTINE HEALTH CARE SYSTEM FROM ISRAEL AND ITS EMERGENCE AS AN INDEPENDENT SYSTEM* 41–56 (Tamara Barnea & Rafiq Hussein eds., 2002); HADAS ZIV, *A LEGACY OF INJUSTICE* 20–25 (Shaul Miri Weingarten ed., Vardi & Miri Weingarten trans., 2002), <http://cdn4.phr.org.il/wp-content/uploads/2016/06/A-Legacy-of-Injustice.pdf>.

7. DANI FILC, *CIRCLES OF EXCLUSION: THE POLITICS OF HEALTH CARE IN ISRAEL* 132 (2009).

8. *Id.* at 133–34.

9. See GROSS, *supra* note 4, at 136–264.

10. FILC, *supra* note 7, at 152.

movement both within the West Bank and Gaza and between these two parts of the OPT.¹¹

This situation, as Filc notes, left the PA with limited powers regarding the movement of patients as well as other issues such as, for example, the determination of venues for Palestinian doctors to specialize.¹² Filc argues that the Ministry of Health established under the PA lacked the resources and the political power necessary for replacing the fragmented health system inherited from the Israeli occupation and tried instead to become a regulator.¹³ As a result of the legacy of the occupation and of policies adopted by the PA, Palestinians in the OPT remained dependent on Israel and other countries for the provision of tertiary health care. This dependence entailed dire consequences, especially with the growing restrictions that have been placed on freedom of movement since the Second Intifada in the early 2000s.¹⁴ Other such restrictions, especially in relation to the separation of Gaza from the West Bank and of both the West Bank and Gaza from East Jerusalem, are still an issue at present. In the Oslo agreement, Israel also ensured that the PA would bear exclusive responsibility for funding the hospitalization of Palestinian patients in Israel.¹⁵

The Palestinian health system has been described as being “in a state of chronic crisis,” with shortages of medication and medical equipment alongside a shortfall in specialist doctors and medical staff in general.¹⁶ The ways that Israeli control over the OPT is related to this crisis have been documented and will not be analyzed here in detail.¹⁷ Emphasis should be placed, however, on the Palestinian health system’s economic dependence on Israel, which results from the continued Israeli control of Palestinian tax money as well as on other, more specific, factors: the dependence on referrals to Israel,¹⁸ Israel’s control of the pharmaceutical market through economic

11. *Id.* For a discussion of the health arrangements under the Oslo Accords, see Gordon & Filc, *supra* note 6, at 466–67. See also ZIV, *supra* note 6, at 26–37.

12. FILC, *supra* note 7, at 138–39.

13. *Id.*

14. *Id.* at 139–40; 143–46.

15. ZIV, *supra* note 6, at 31.

16. MON EFRAT, PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, DIVIDE & CONQUER: INEQUALITY IN HEALTH 7 (Reut Katz ed., G. Daniel & Dena Bugel-Shunra trans., 2015), <http://cdn3.phr.org.il/wp-content/uploads/2016/04/Divide-And-Conquer.pdf>.

17. See *id.*

18. *Id.* at 42–43.

agreements,¹⁹ limitations on the development of Palestinian medical professionals by denying students entry to Jerusalem for clinical training,²⁰ and quotas on teams from the West Bank allowed to work in East Jerusalem.²¹ Further factors are the limitations on patient mobility,²² discussed below in detail, as well as on ambulance mobility²³ and, more generally, the effects of violence and imprisonment on the health of Palestinians.²⁴

This Article only addresses issues touching on access to health care, although this aspect does certainly not exhaust the right to health.²⁵ The “medicalization” of the right to health, referring to the focus on health care rather than on social determinants of health such as education, nutrition, and housing, has indeed been criticized.²⁶ Nonetheless, this Article will not address important issues that are not directly related to access to health care, such as the effects of the occupation’s discriminatory policies and the stress on more general determinants of OPT residents’ health.²⁷ Although those questions are obviously critical, this Article is not an exhaustive

19. *Id.* at 44–45. See ORLY ALMI, WHO PROFITS, CAPTIVE ECONOMY: THE PHARMACEUTICAL INDUSTRY AND THE ISRAELI OCCUPATION (2012), http://www.whoprofits.org/sites/default/files/captive_economy_0.pdf.

20. EFRAT, *supra* note 16, at 45–47.

21. *Id.* at 46–47.

22. *See id.* at 47–48.

23. *See id.* at 48–49.

24. *See id.* at 50–51.

25. *See The Right to Health in an Era of Privatization and Globalization*, *supra* note 1.

26. To look at “medicalization” in this context, see Benjamin M. Meier, *The World Health Organization, the Evolution of Human Rights, and the Failure to Achieve Health for All*, in GLOBAL HEALTH AND HUMAN RIGHTS: LEGAL AND PHILOSOPHICAL PERSPECTIVES, 163–89 (John Harrington & Maria Stuttard eds., 2010). For the discussion on social determinants, see generally WORLD HEALTH ORG. COMM’N. ON SOC. DETERMINANTS OF HEALTH, CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINANTS OF HEALTH (2008), http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf; Audrey R. Chapman, *The Social Determinants of Health, Health Equity and Human Rights*, 12 HEALTH & HUM. RTS. 17 (2010); Katarina Tomasevski, *Health Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 125, 126 (Asbjorn Eide et al. eds., 1995).

27. For the discussion on the influence of discrimination on health, see Nancy Krieger, *Discrimination and Health*, in SOCIAL EPIDEMIOLOGY 36 (Lisa Berkman et al. eds., 2000). For the discussion on the effect of stress caused by discrimination on health, see Ilan H. Meyer, *Prejudice and Discrimination as Social Stressors*, in THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER POPULATIONS 242 (Ilan H. Meyer & Mary Northridge eds., 2007).

study of the fulfillment (or lack thereof) of the OPT's residents right to health,²⁸ but of the role that litigation in Israeli courts has played in addressing this right and, specifically, the aspects of it pertaining to access to health care.

Part I of this Article outlines the normative framework relevant to the discussion. Part II focuses on freedom of movement, the issue identified as crucial in the litigation affecting access to health care. Part III deals with the protection of civilians and medical teams during hostilities. The conclusions sum up the various topics discussed, showing how Israeli case law on the right to health of Palestinians in the OPT is almost entirely lacking in any references to the right to health as a human right in international law and turns only rarely to the specific obligations under International Humanitarian Law (IHL). These lacunae are pointed out in the argumentation adopted by the courts especially, but not only, in the Gaza cases: Israeli courts often deal with access to health care by Palestinians from the OPT as mainly a humanitarian issue (not in the sense of binding obligations from IHL but in the sense of a humanitarian gesture) rather than as a matter raising questions of rights and duties.

I. THE NORMATIVE FRAMEWORK

A. INTERNATIONAL HUMANITARIAN LAW

A number of legal sources are relevant to the right to health in the OPT. The first is IHL, which is applicable in occupied territories.²⁹ While the Geneva Conventions include provisions on the protection of the health of combatants who are sick or injured,³⁰ the present Article focuses on the protection of the

28. For some of these issues, see WORLD HEALTH ORGANIZATION, REPORT OF A FIELD ASSESSMENT OF HEALTH CONDITIONS IN THE OCCUPIED PALESTINIAN TERRITORY (OPT) (2015), http://www.who.int/hac/crises/international/wbgs/opt_field_assessment_health_conditions_1april2015.pdf. For social and economic determinants of health in the context of the OPT, see EFRAT, *supra* note 16, at 10–18.

29. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter The Fourth Geneva Convention].

30. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 12, 15, 19–20, 24, 26, 35, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention].

right to health of civilians living in an occupied territory. The relevant IHL provisions are thus found mostly in the Fourth Geneva Convention (GCIV) dealing with the protection of civilians, which includes provisions entitling “protected persons”³¹ to “respect for their persons,”³² the requirement of “particular protection and respect” for the wounded, sick and infirm,³³ duties concerning the removal of the wounded, sick, and infirm from besieged or encircled areas and the passage of medical personnel and equipment to such areas,³⁴ the protection of civilian hospitals and their personnel,³⁵ of convoys conveying wounded and sick civilians,³⁶ and the free passage of all consignments of medical and hospital stores.³⁷ While these provisions are relevant to the protection of civilians any time the GCIV is triggered (meaning situations of armed conflict and/or occupation), some apply specifically in occupation and are thus of special relevance, reflecting the broader duties of the occupying power controlling the territory. Thus, an occupier has the duty of “ensuring the . . . medical supplies of the population,” including bringing in “medical stores and other articles if the resources of the occupied territory are inadequate.”³⁸ Moreover, the occupying power has the duty “of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishment and services, public health and hygiene in the occupied territory,” to allow for medical personnel of all categories to carry on their duties,³⁹ and for National Red Cross Societies to pursue their activities.⁴⁰ If the population in the occupied territory is inadequately supplied, the occupying power shall agree to relief schemes and shall facilitate

31. Palestinians living in the OPT are protected persons in the sense defined in The Fourth Geneva Convention. The Fourth Geneva Convention, *supra* note 29, art 4.

32. *Id.* art. 27. See Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 10-11, June 8, 1977, 1125 U.N.T.S. 3; 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol I]. Israel is not a party to Additional Protocol I but is bound by the parts of it that are considered as customary international law.

33. The Fourth Geneva Convention, *supra* note 29, art. 16.

34. *Id.* art. 17.

35. *Id.* arts. 18-20; Additional Protocol I, *supra* note 32, arts. 12–29.

36. The Fourth Geneva Convention, *supra* note 29, arts. 21–22.

37. *Id.* art. 23.

38. *Id.* art. 55.

39. *Id.* art. 56. For related provisions, see *id.* art. 57.

40. *Id.* art. 63.

them, including the provision of medical supplies.⁴¹ These provisions reflect the overall responsibility of an occupying power for access to health care in an occupied territory.

Several questions arise regarding the application of these provisions and the duties they entail in the context discussed in this article. The first relates to Israel's position stating that GCIV does not apply to the OPT given that, before 1967, the area was not part of a state party to GCIV.⁴² Israel took this position after 1967 while declaring that it would de facto act in accordance with the Convention's humanitarian provisions.⁴³ This position, however, has been widely rejected, including by the International Court of Justice,⁴⁴ and this article, therefore, assumes that GCIV applies to the OPT. The second question touches on the scope of Israel's duties after the Oslo Accords, which transferred health from Israel, the occupying power, to the PA, giving rise to complex questions about the division of duties regarding access to health care in the OPT.⁴⁵ This article, as noted, endorses a functional approach stating that Israel bears full responsibility whenever its actions affect the OPT residents' access to health care. Moreover, according to the Oslo Agreements, Israel retained its overall responsibilities as occupier,⁴⁶ even if some of the authority was "outsourced" to the

41. See *id.* art. 59, 60–61. For a discussion of some of these duties, see YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 355-74, 399-547 (2009). YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 187-90, 191-94 (2009).

42. See Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 263 (1971).

43. *Id.*

44. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 101 (July 9). For a discussion of the arguments dismissing the Israeli positions, see GROSS, *supra* note 4, at 136-264.

45. See Declaration of Principles on Interim Self-Government Arrangements (DOP), Isr.-PLO, art. 6, Sept. 13, 1993, www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm [hereinafter Oslo Accords]; GEOFFREY R. WATSON, *THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 43-44 (2000).

46. See Oslo Accords, *supra* note 45, art. 6. For a discussion, see WATSON, *supra* note 45, at 43–44. Joel Singer, the legal advisor to the Israeli Ministry of Foreign Affairs during the signing of the Oslo Accords, emphasized that the status of the West Bank and Gaza was not to be changed, notwithstanding the transfer to the Palestinian Authority (PA) of certain powers and responsibilities previously exercised by Israel. See Oslo Accords, *supra* note 45, art. 4 (determining that both sides view the West Bank and the Gaza Strip as a single

PA meaning that, should the latter not fulfill the right to health where it is acting, Israel could still be held responsible.⁴⁷ This is a significant issue given the many cases pertaining to restrictions on exit from the OPT to enter Israel, or to travel from Israel to other countries when adequate health care is unavailable in the OPT. Israel's responsibility under IHL (as well as under human rights law, as addressed below) derives from its overall responsibility as the occupier as well as from its specific actions, which control the life and movement of the occupied population and thus their access to health care.

B. INTERNATIONAL HUMAN RIGHTS LAW

Besides IHL, international human rights law also applies. Current international law analysis assumes that human rights standards apply extraterritorially, that is, a state is bound by these standards not only in its actions within its own territory but also beyond it.⁴⁸ This view is supported by the growing

territorial unit whose integrity will be preserved during the interim period). Article 6 of Annex 2 to the same declaration determined that, other than the agreed arrangements, the status of Gaza and Jericho (where Palestinian self-rule was first implemented) would continue to be an integral part of the West Bank and the Gaza Strip and would not be changed in the interim period. *Id.* annex 2, art. 2. Identical declarations appear in Articles XXX.8 and XI.1. of the Interim Agreement. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, Sept. 28, 1995, <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx>. See also Agreement on Preparatory Transfer of Powers and Responsibilities, Isr.-PLO, art. 13(5), Aug. 29, 1994, <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/agreement%20on%20preparatory%20transfer%20of%20powers%20and%20re.aspx> (determining that the Gaza Strip and the Jericho Area would continue to be an integral part of the West Bank and the Gaza Strip and that the status of the West Bank would not be changed for the period of the agreement and nothing in the agreement would be construed as changing this status); Joel Singer, *Aspects of Foreign Relations under the Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza*, 28 ISR. L. REV. 268, 274 (1994); Joel Singer, *The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects*, 1 JUSTICE MAG. 4, 6 (1994).

47. On the need to hold Israel responsible for the Palestinians' health status and access to health care, see FILC, *supra* note 7, at 152.

48. See MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2011); GLOBAL JUSTICE, *STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* (Malcolm Langford et al. eds., 2012); Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid

international jurisprudence on the human rights duties of states occupying territory beyond their borders or otherwise exercising extraterritorial control. Given that the context of the present discussion is of an armed conflict and occupation, it also merits note that most courts, tribunals, treaty bodies, and scholars addressing this matter currently hold that human rights norms apply alongside IHL.⁴⁹ Despite the complex relationship between these sets of duties,⁵⁰ obligations stemming from the right to health are clearly applicable in this situation given the scope and duration of Israel's control in both the West Bank and Gaza. Questions may certainly arise concerning the duties of a belligerent or occupying power that derive from social and economic rights such as, whether a belligerent or short-term occupier (unlike Israel) can be considered as lacking capabilities to develop an extensive healthcare or welfare system in the external territory under its control.⁵¹ Yet, these issues are not

⁴⁹5D=23, [hereinafter Maastricht Principles].

⁴⁹. This position has been taken by the International Court of Justice concerning armed conflict in general. *E.g.* Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2005 I.C.J. Rep. 168, ¶ 178 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 102–14 (July 9) (specifically concerning occupation); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8). The same position has been taken by the European Court of Justice in a few of its judgments, notably in *Al-Skeini v. United Kingdom*, App. No. 55721/ 07, 53 Eur. H.R. Rep. 589 ¶¶ 90–91, 131–38 (2011). This position has also been taken by the Israel Supreme Court in some of its cases, such as HCJ 769/02 Public Committee Against Torture in Israel v. Gov't of Israel, ¶ 18 (December 14, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.). A similar view was expressed by the U.N. Treaty Bodies. *See* Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2004); Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?* 18 EUR. J. INT'L L. 1 (2007); Aeyal Gross, *The Righting of the Law of Occupation*, in THE FRONTIERS OF HUMAN RIGHTS (Nehal Bhuta ed., 2016); Noam Lubell, *Human Rights in Military Occupations*, 94 INT'L REV. RED CROSS 317 (2012); YUTAKA ARAI-TAKAHASHI, *supra* note 41, at 399–547. The literature on this topic is extensive, and these are only a few examples.

⁵⁰. For a discussion of the relationship in the context of the right to health, see Sylvain Vite, *The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health, and Property*, 90 INT'L REV. RED CROSS 629 (2008).

⁵¹. *See* Lubell, *supra* note 49, at 322. Lubell points out how, in the context of occupation, practical and legal impossibilities may play a part in an occupier's limited ability to implement human rights obligations in the same manner it does domestically. He suggests that, although the starting point is the presupposition of a need to meet the entire range of obligations, the contextual circumstances should be taken into account in determining the obligations that

relevant to the duties touching on international human rights law discussed in this Article. Generally, differences may be expected between a state's domestic duties in relation to social and economic rights and those it bears extraterritorially, which can vary with the circumstances. As for the OPT, the scope and duration of Israel's control translate into extensive obligations. Concerning a state's extraterritorial obligations, questions may arise as to its positive obligations to *fulfill* the right, proactively engaging in activities that ensure its enjoyment. The length and extent of Israel's control, however, do appear to generate obligations to *fulfill* the right or, at the very least, a negative obligation to *respect* the right. Most of the instances discussed below indeed address the latter obligation, as could be expected given the existence of the PA and the fact that Israel is no longer involved in the provision of health services in the OPT, with the exception of East Jerusalem.⁵²

Particularly important for the discussion of the right to health from an international human rights law perspective is Article 12 of the International Covenant on Economic, Social, and Cultural Rights. Article 12 determines that each state recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," detailing the steps needed to realize this right, including the prevention, treatment, and control of epidemic, endemic, occupational and

apply in each individual case. *Id.* Territorial control, including occupation, does trigger the applicability of the full range of human rights obligations a state must uphold. The substantive elements of the obligation and the assessment of whether a violation has occurred, however, must be determined in light of the factual and legal contexts, including issues of logistical ability to act or restrictions on the occupying power in the occupation regime. *Cf.* the discussion of the obligation to fulfill the right to food during occupation in Aeyal Gross & Tamar Feldman, "We Didn't Want to Hear the Word 'Calories': Rethinking Food Security, Food Power, and Food Sovereignty—Lessons from the Gaza Closure," 33 *BERKELEY J. INT'L L.* 379 (2015).

52. For a discussion of the typology of obligations, see Maastricht Principles, *supra* note 48, which addresses the "obligation to avoid causing harm" (Principle 13), but also the obligation of occupying states or states that otherwise exercise effective control over territory outside their territories to respect, protect, and fulfill the economic, social, and cultural rights of persons within that territory (Principle 18). *See generally* Comm. on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of State Parties' Obligations (Art. 2, Para. 1, of the Covenant) on Its Fifth Session, U.N. Doc. E/1991/23 (1991); Comm. on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) on Its Twenty-Second Session, U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment 14].

other diseases and the creation of conditions that would assure medical attention and services to all in the event of sickness.⁵³

General Comment 14 of the U.N. Committee on Economic, Social, and Cultural Rights, which is the official interpretation of Article 12, is a key attempt to infuse concrete substance into the right to health. Four major principles that emerge from the General Comment are relevant to the subjects discussed in this article:⁵⁴

(a) *Availability*: The state must have an adequate amount of existing health facilities, products, services, and programs.⁵⁵ The precise nature of these features will fluctuate in accordance with varying circumstances, including the state's level of development.⁵⁶ In any event, they include the background conditions for health, such as water and sanitation, hospitals, clinics, trained medical staff, and essential drugs.⁵⁷

(b) *Accessibility*: All health facilities, products, and services must be equally accessible to all, without any discrimination.⁵⁸ There are four overlapping aspects to accessibility. (1) A prohibition on discrimination, especially against the most vulnerable and marginalized sectors of the population.⁵⁹ (2) Physical accessibility to all sectors of the population, especially vulnerable and marginalized groups such as minorities, women, children, the elderly, the disabled, and HIV and AIDS carriers and patients.⁶⁰ (3) Economic accessibility to all. The system of payment for health services, as well as for services related to background conditions for health, must be based on a principle of equity and must guarantee that these services, whether privately or publicly provided, are accessible to everyone, especially socially underprivileged groups.⁶¹ Equity mandates that the health expenditure burden borne by poor

53. International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360, 993 U.N.T.S. 3 (1967). See also *The Right to Health in an Era of Privatization and Globalization*, *supra* note 1.

54. See generally *The Right to Health in an Era of Privatization and Globalization*, *supra* note 1.

55. See General Comment 14, *supra* note 52, ¶ 12(a).

56. *Id.*

57. See BRIGIT C.A. TOEBES, *THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW* 115-16 (2001) (discussing "availability" in this sense).

58. See General Comment 14, *supra* note 52, ¶ 12(b).

59. *Id.* ¶ 12(b)(i).

60. *Id.* ¶ 12(b)(ii).

61. *Id.* ¶ 12(b)(iii).

households not be disproportionate to that borne by wealthier households.⁶² (4) Accessibility to information—the right to request, receive, and provide information and ideas on health issues, subject to the right to personal medical confidentiality.⁶³

(c) *Acceptability*: All health facilities, products, and services must abide by medical ethics and be sensitive to and respectful of the communities, gender differences, confidentiality, and the duty to improve the health status of all those concerned.⁶⁴

(d) *Quality*: All health facilities, products, and services must be suitable for their purpose and of a good medical and scientific quality.⁶⁵ To this end, amongst other things, skilled medical teams, drugs, and scientifically approved hospital equipment, as well as clean and potable water and adequate sanitation are necessary.⁶⁶

The extent to which Israel, the occupying power, can de facto sustain these principles depends on the noted division between its own powers and those of the PA. Even adopting the position that the occupying power bears full responsibility on this matter notwithstanding the role of the PA, many of the litigated cases have in fact dealt with *accessibility*—a central pillar of the right to health. Yet, whereas much of domestic litigation on the right to health (in Israel and elsewhere), deals with financial accessibility, many of the cases relating to the OPT deal with physical accessibility when limited because of restrictions on freedom of movement within and outside the OPT, as discussed in detail in Part III below. When Israel's actions restrict access to health care, it is responsible for violating the right of OPT Palestinians. The Israeli High Court of Justice (HCJ) has referred to the international human right to health in cases dealing with access to health care in Israel for Israeli residents,⁶⁷ but not in the cases dealing with OPT residents discussed in this Article. In some cases, the reason is the HCJ's reliance on more specific provisions of IHL, and in others, the HCJ's general tendency to eschew matters of principle altogether in favor of a search for pragmatic solutions. The significance of this absence

62. *Id.*

63. *Id.* ¶ 12(b)(iv); *The Right to Health in an Era of Privatization and Globalization*, *supra* note 1, at 301.

64. See General Comment 14, *supra* note 52, ¶ 12(c).

65. *Id.* ¶ 12(d).

66. *Id.* See also TOEBES, *supra* note 57, at 112.

67. See, e.g., HCJ 3071/05 Gila Luzon v. Israel ¶ 11 (July 28, 2008), Nevo Legal Database (by subscription) (Isr.).

of human rights analysis will become apparent below.

C. ISRAELI LAW

Israeli law does not apply in the OPT. In cases involving the Israeli army, however, the HCJ has pointed out the army's obligation to act in accordance with the standards of Israeli administrative law.⁶⁸ Yet, this view pertains to general principles. The limited recognition of the right to health in Israeli constitutional law⁶⁹ did not affect the litigation relating to the Palestinians' right to health. One critical aspect, discussed in the next section, is the exclusion of Palestinians residing in the OPT from the Israeli National Health Insurance Law.

D. EXCLUSION FROM ISRAELI NATIONAL HEALTH INSURANCE LAW

The exclusion of Palestinian residents of the OPT (except for East Jerusalem) from the Israeli National Health Insurance Law (NHIL) is another aspect where the implementation of the right to health reflects the structure of the occupation as a whole, especially since the NHIL applies *in personam* to Israeli settlers living in the OPT. Personal application of Israeli law to settlers works in a myriad of ways.⁷⁰ Concerning the NHIL, Emergency Regulations issued by the Israeli government and regularly renewed through legislation⁷¹ determine that, for the purpose of certain Israeli statutes, including the NHIL, people who live in

68. *Id.*

69. Aeyal Gross, *In Search of the Right to Health in Israeli Constitutional Law*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 311 (Gideon Sapir, Daphne Barak-Erez & Aharon Barak eds., 2013); Aeyal Gross, *The Right to Health in Israel Between Solidarity and Neoliberalism*, in THE RIGHT TO HEALTH AT THE PUBLIC/PRIVATE DIVIDE: A GLOBAL COMPARATIVE STUDY 159, 163 (Colleen M. Flood & Aeyal Gross eds., 2014).

70. See GROSS, *supra* note 4, at 136–264. See also ACRI, ONE RULE—TWO LEGAL SYSTEMS: ISRAEL'S REGIME OF LAWS IN THE WEST BANK (2014), <http://www.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>; EYAL BENVENISTI, LEGAL DUALISM: THE ABSORPTION OF THE OCCUPIED TERRITORIES INTO ISRAEL 3–32 (Boulder Colo.: Westview Press 1990); BENVENISTI, *supra* note 5, at 233–38.

71. Law for the Extension of Emergency Regulations (Judea, Samaria and the Gaza Strip—Judging for Offences and Legal Aid), 5727–1967, SH No. 517 p. 20 (Isr.); Law for the Extension of Emergency Regulations (Judea and Samaria—Judging for Offences and Legal Aid), 5772–2012, SH No. 2365 p. 476 (Isr.).

the OPT will be considered residents of Israel if they are Israeli citizens *or* are “entitled to immigrate to Israel under the Law of Return” (that is, Jews and family members of Jews).⁷² This provision is critical because the NHIL regularly applies only to residents of Israel, and the OPT (except for East Jerusalem) is, legally, not part of Israel. The net result is a different set of rights and duties applying to different groups in the OPT along ethnic lines, including access to health care. The story of health care is thus one of the building blocks in the continued Israeli control of the OPT, which is typified by a *de facto* annexation that includes settling citizens of Israel in the OPT (*contra* GCIV)⁷³ without annexing the territory and without granting its Palestinian residents the same rights enjoyed by the Israeli Jewish settlers.⁷⁴ Another aspect of health care reflecting the main features of this occupation is freedom of movement. Restrictions on this freedom are one of this occupation’s most salient features, and a great deal of the litigation on the right to health in the OPT touches on it. Freedom of movement is thus the topic of the next section.

II. FREEDOM OF MOVEMENT

A. BACKGROUND

A brief account of freedom of movement in the OPT is required here to clarify the background of the restrictions imposed on it and their effect on health care that can, in a way, sum up the story of the occupation. Ariel Handel, a researcher at Tel Aviv University, argues that the spatial conflict in Israel/Palestine is not over land units but over the very possibility of using the space.⁷⁵ His suggestion is that any map

72. Article 1 of the 1950 Law of Return gives Jews the right to immigrate to Israel. Article 4B defines as a Jew a person who was born to a Jewish mother or who has converted to Judaism and is not a member of another religion. The right is also granted to children, grandchildren, and spouses of Jews, and to spouses of children and grandchildren of Jews, unless they were born Jews and willingly converted to another religion (Article 4A). Law of Return, 5710-1950, 4 LSI 114 (1950).

73. The Fourth Geneva Convention, *supra* note 29, art. 49(6).

74. GROSS, *supra* note 4, at 136–264.

75. Ariel Handel, *Where, Where To, and When in the Occupied Territories: An Introduction to Geography of Disaster*, in *THE POWER OF INCLUSIVE EXCLUSION; ANATOMY OF ISRAELI RULE IN THE OCCUPIED PALESTINIAN TERRITORIES* 179, 181 (Adi Ophir, Michal Givoni & Sari Hanafi eds., 2009).

of the spatial state of affairs in the OPT represents only the principle of temporariness and contingency, pointing to indeterminacy concerning how to travel and how long it will take.⁷⁶ This dimension of the occupation can obviously affect physical access to health care and the litigation on these matters has accordingly changed over the years.

In 1967, the Israeli Cabinet approved the plan of the then Defense Minister Moshe Dayan for an “invisible administration,” meaning “open bridges” between the West Bank and Jordan as well as free movement between the West Bank and the Gaza Strip and between the OPT and Israel.⁷⁷ A general exit permit was accordingly issued in 1972, allowing OPT residents to enter Israel without individual permits.⁷⁸ The first restrictions on this permit were imposed in 1989, two years after the outbreak of the First Intifada.⁷⁹ Palestinians from Gaza working in Israel were required to carry a magnetic card that contained updated information on their “security history” and on the payment of taxes and utilities, which was to be renewed annually.⁸⁰ On the eve of the 1991 Gulf War, however, as part of Israel’s “security measures,” the general exit permit was canceled and each resident of the OPT wanting to enter Israel was required to obtain an individual permit,⁸¹ though the prohibition of Palestinians entering Israel was fully enforced only from March 1993.⁸² In 1995, the Brodet Committee recommended that the Palestinians’ entry into Israel be made conditional on security checks and on increased law enforcement measures against those entering without a permit and against their employers.⁸³ In the same year, the magnetic card policy

76. On the bureaucratic regime regarding movement, see Yael Berda, *THE BUREAUCRACY OF THE OCCUPATION: THE PERMITS REGIME IN THE WEST BANK 2000–2006* (2012). See also Yael Berda, *LIVING EMERGENCY: ISRAEL’S PERMIT REGIME IN THE OCCUPIED WEST BANK* (Stanford University Press 2017); Gordon & Filc, *supra* note 6, at 469–72.

77. Ariel Handel, *Chronology of the Occupation Regime 1967–2007*, in *THE POWER OF INCLUSIVE EXCLUSION; ANATOMY OF ISRAELI RULE IN THE OCCUPIED PALESTINIAN TERRITORIES* 603, 605 (Adi Ophir, Michal Givoni & Sari Hanafi eds., 2009).

78. Although the permit was not in force 1:00–5:00 AM, many Palestinians workers remained in Israel through the night. *Id.* at 608.

79. GROSS, *supra* note 4, at 256.

80. See Handel, *supra* note 77, at 617.

81. That was also the first time that Israel declared a full closure of the OPT for forty-one days. *Id.* at 618.

82. *Id.* at 619.

83. GROSS, *supra* note 4, at 256–57.

was extended to Palestinians from the West Bank as well.⁸⁴ In 1996, following a wave of terrorist attacks, comprehensive closure as well as an internal closure were imposed on the OPT.⁸⁵ After 1993, following the Oslo Accords that divided the OPT into various areas according to the degree of Israeli or PA control and declared the settlements out of bounds for Palestinians, further restrictions on freedom of movement for Palestinians were imposed within the OPT.⁸⁶ To provide for the settlers' security and, in fact, for their "right" to travel without having to go through Palestinian-controlled areas, "bypass roads" were built for the sole use of settlers.⁸⁷ In 2000, at the beginning of the Second Intifada, Israel banned Palestinians from entering Israel and closed the "safe passage" between the West Bank and Gaza, the Rafah Crossing, and the international airport in Gaza.⁸⁸ In 2001, Israel imposed serious restrictions on travel within the West Bank, including "encirclements" of all Palestinian cities preventing entry and exit of private vehicles and followed by barriers stopping vehicles from crossing into Israel from the West Bank.⁸⁹ In 2002, Israel began to issue internal travel permits within the West Bank to allow entry through the encirclements it had imposed.⁹⁰ This period was typified by the dissection of the OPT into many and frequently changing "land cells," with many checkpoints within the West Bank and with passage between areas becoming slow, unpredictable, and nearly impossible.⁹¹ Palestinians wasted much time in their travels without knowing whether and when they would arrive at their destination.⁹² These restrictions undermine the Palestinians' ability to work, produce, sell, and keep in touch,⁹³

84. Handel, *supra* note 77, at 620.

85. *Id.* at 621.

86. See Oslo Accords, *supra* note 45.

87. See Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, *The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221 (1997). See also AHRON BREGMAN, *CURSED VICTORY: A HISTORY OF ISRAEL AND THE OCCUPIED TERRITORIES* 183–84 (2014); ELISHA EFRAI, *THE WEST BANK AND GAZA STRIP: A GEOGRAPHY OF OCCUPATION AND DISENGAGEMENT* 80–86 (2006).

88. Handel, *supra* note 77, at 624.

89. *Id.* at 625.

90. *Id.*

91. Handel, *supra* note 75, at 182–84. See also Sari Hanafi, *Spacio-cide: Colonial Politics, Invisibility and Rezoning in Palestinian Territory*, 2 CONTEMP. ARAB AFF. 106 (2009); BENVENISTI, *supra* note 5, at 238–39.

92. Handel, *supra* note 75, at 191.

93. *Id.* at 193.

as well as their access to health care.

Restrictions also hinder the entry of ambulances and make access to more sophisticated health care facilities extremely difficult. Chronically ill patients and pregnant women have been particularly affected, including several reported cases of women losing their babies because of delays at checkpoints during labor.⁹⁴

The building of the wall in the West Bank beginning in 2003⁹⁵ led to further restrictions on freedom of movement.⁹⁶ This period was also characterized by the growing separation of the West Bank from Gaza, especially after the 2005 “disengagement,” when Israel pulled out settlers and a permanent military presence from Gaza.⁹⁷ After the disengagement, Israel continued to control not only the movement of people from Gaza into Israel but also attempted to control movement between Gaza and Egypt via the Rafah crossing—the only operational border crossing between Egypt and Gaza.⁹⁸ The agreement, Agreement on Movement and Access (AMA): Agreed Principles for Rafah Crossing,⁹⁹ brokered by the United States after the “disengagement” stated that the PA was to operate the Rafah Crossing under the supervision of EU monitors who would be present at the Crossing, and of Israeli security officials who would oversee the operation via video footage and supervision of the passengers list.¹⁰⁰ The

94. FILC, *supra* note 7, at 144–45.

95. Handel, *supra* note 75, at 626.

96. FILC, *supra* note 7, at 148–49.

97. SARI BASHI & EITAN DIAMOND, SEPARATING LAND, SEPARATING PEOPLE: LEGAL ANALYSIS OF ACCESS RESTRICTIONS BETWEEN GAZA AND THE WEST BANK 5 (2015).

98. *Id.*

99. Agreed Documents on Movement and Access from and to Gaza, Agreed Principles for Rafah Crossing (APRC), Isr.-PA, Nov. 15, 2005, <http://www.eubam-rafah.eu/files/Agreed%20Principles%20for%20Rafah%20Crossing.pdf>.

100. *Id.* Travel via Rafah would be restricted, with few exceptions, to Palestinians registered in the Israeli-controlled Palestinian Population Registry, with Israel reserving the right to block entry of Palestinian ID holders it considered “terror activists.” Even in the “exceptional” categories—diplomats, foreign visitors, foreign representatives of recognized international organizations, and humanitarian cases—a foreigner’s ability to cross would be subject to veto by Israel, which would have forty-eight hours to register its objection. See SARI BASHI & KENNETH MANN, *DISENGAGED OCCUPIERS: THE LEGAL STATUS OF GAZA* 32-33 (2007). The author of this Article is a member of the board of Gisha, was consulted on this report, and is acknowledged in it. The positions expressed here, however, are only the author’s.

Rafah Crossing was to be monitored by Israeli security officials via cameras receiving video and data feed on its operation in real time.¹⁰¹ Under these arrangements, then, foreigners could enter Gaza only via the Israeli-controlled crossing at Erez, and the Gazans' possibilities of receiving family members, visiting lecturers, professionals, businesspersons, and medical care workers were all restricted and dependent on obtaining an entry visa to Israel, as illustrated in some of the cases discussed below.¹⁰²

Under AMA, Israel also controlled all imports into Gaza. Except for personal effects brought in by travelers, imports were not permitted via air, sea, or the Rafah Crossing, and only goods passing through and inspected in Israel could be brought in.¹⁰³ The import of any goods into Gaza thus remained dependent on Israel opening the crossings and on its regulations as to what would be allowed through it, a closure entailing huge effects for all aspects of life.¹⁰⁴

The opening and closing of the crossings have fluctuated over time. Regarding the Rafah Crossing, after Palestinians attacked an Israeli military outpost at Kerem Shalom in June 2006 and captured Gilad Shalit, an Israeli soldier, Israel stopped implementing the AMA and kept the Crossing mostly closed.¹⁰⁵ After June 2007, when Hamas took control of the government in the Gaza Strip, Israel froze implementation of the AMA.¹⁰⁶ Ever since, and given other changes instituted by the new Egyptian government, the Crossing has remained mostly closed.¹⁰⁷ Gazans have resorted to alternatives, such as breaches of the border by Hamas,¹⁰⁸ ad hoc Egypt-Hamas arrangements that led

101. BASHI & MANN, *supra* note 100, at 33–36. An Israeli objection to the entrance of a foreigner in one of the exceptional categories triggered a process of consultations between Israeli, Palestinians, and EU representatives with Israel making the final decision, even though the wording of the agreement suggested that Israel's role is advisory. Israeli consent was required for the Rafah crossing to be open and Israel could close it, as it did at times, based on what it considered security considerations. The European monitors would not staff their positions in Rafah if Israel said it would not open the crossing because of security reasons. *See also* NOGA KADMAN, RAFA CROSSING: WHO HOLDS THE KEYS? 21–28 (2009).

102. BASHI & MANN, *supra* note 100, at 35.

103. *Id.* at 41; KADMAN, *supra* note 101, at 27.

104. KADMAN, *supra* note 101, at 65–117.

105. *Id.* at 27.

106. *Id.* at 29.

107. *Id.* at 35–38.

108. *Id.* at 44–47.

to unpredictable and irregular openings for brief periods in response to pressures from both sides of the border,¹⁰⁹ and the use of tunnels dug under the Gaza-Egypt border.¹¹⁰

The fluid situation in Gaza is also related to political developments *within* the PA. Hamas gained a majority in the 2006 elections to the Palestinian Legislative Council, ending the Fatah dominance that had prevailed since the PA's establishment.¹¹¹ In March 2007, a Hamas-led national unity government was formed together with Fatah, the largest group in the Palestine Liberation Organization.¹¹² This alliance broke down and, in June 2007, following its success in an armed struggle with Fatah, Hamas assumed overall control of Gaza.¹¹³ As a result, PA President Abbas, a Fatah member, dismissed the Hamas-led government and, ever since, the West Bank has been under Fatah control and Gaza under Hamas.¹¹⁴ In the wake of these developments, Israel imposed a closure on Gaza in 2007.¹¹⁵

Restrictions on the movement of people and goods in Gaza, however, developed in several stages even before 2007. As described, following the removal of the settlements and of the military presence in 2005, Israel sustained its control of access to and from Gaza via sea and air and, to a smaller extent, through the Gaza-Egypt border.¹¹⁶ Nevertheless, Israel proceeded to relate to Gaza as a foreign territory to which it owes no responsibilities other than those mandated by the laws of armed conflict.¹¹⁷ In 2006–2010, for example, the Rafah Crossing with Egypt was closed almost entirely.¹¹⁸ As a result, approval to cross the Gaza-Israel border was required in order to leave Gaza to any destination.¹¹⁹ After it was opened in 2010 to restricted traffic, an Israeli-approved identification card was

109. *Id.* at 47–52.

110. *Id.* at 52–55.

111. BASHI & MANN, *supra* note 100, at 8–11.

112. *Id.*

113. *Id.*

114. See Iain Scobbie, *Gaza*, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 280 (Elizabeth Wilmshurst ed., 2012).

115. BASHI & MANN, *supra* note 100, at 8–11.

116. *Id.*

117. Sari Bashi, *Controlling Perimeters, Controlling Lives: Israel and Gaza*, 7 L. & ETHICS HUM. RTS, 243, 246–47 (2013) (shows how control over access is a new form of bureaucratic control, typical of colonial and military regimes).

118. *Id.* at 252.

119. *Id.* at 252–53.

still needed for passing.¹²⁰ Passage to the West Bank, however, remained under Israeli control which meant Palestinians who were Gaza residents were not allowed to enter the West Bank through the Israel-Jordan crossing even if they had made the long detour from Gaza via Egypt and Jordan.¹²¹ As for goods, prior to 2007, the restrictions had been implemented mostly by closing the commercial crossings or restricting their opening hours.¹²² In 2007, the government initiated a policy of deliberately restricting the movement of goods solely to those necessary for basic human needs.¹²³ Given the additional naval and aerial blockade imposed by Israel,¹²⁴ restrictions on freedom of movement to and from Gaza imposed by Israel are extensive. The next section deals with the effect of freedom of movement restrictions on health care.

B. CASES INVOLVING FREEDOM OF MOVEMENT AND ACCESS TO HEALTH CARE

The review of issues relating to freedom of movement in the OPT describing different stages and options of restrictions highlights the centrality of this issue to the Israeli occupation and, specifically, to *physical* access to health care.¹²⁵ The discussion in this section considers case law related to this topic. The cases were divided into three categories that reflect varieties of restrictions on freedom of movement: (1) issues involving checkpoints and other restrictions within the OPT, especially within the West Bank, (2) issues involving restrictions caused by the wall, (3) issues involving exit permits (to Israel or elsewhere) from the OPT. The third category is further divided into three categories: cases involving exit of patients from the West Bank and from Gaza before the disengagement, cases involving exit of patients from Gaza after the disengagement, and cases relating to the exit of medical staff and medical students.¹²⁶

120. *Id.* at 253.

121. *Id.*

122. *Id.* at 259.

123. *Id.*

124. *See generally* Gross & Feldman, *supra* note 51 (discussing the restriction of the movement of goods in connection to food security).

125. *See* Angelo Stefanini & Hadas Ziv, *Occupied Palestinian Territory: Linking Health to Human Rights*, 8 HEALTH & HUM. RTS. 160 (2004). *See also* ZIV, *supra* note 6, at 38–56.

126. A case pre-dating the ones discussed below dealt with the provision of

1. Checkpoints, Blockings, and "Encirclements"

Cases dealing with restrictions on freedom of movement through the use of checkpoints in ways that affect access to health care were especially prevalent at the height of the Second Intifada, which erupted in 2000.¹²⁷ A number of such cases reached the Israeli Supreme Court sitting as High Court of Justice (HCJ). Usually, the HCJ refrained from intervening, at times seeing the petitions as too general and at times accepting the army's promises to ease the restrictions when access to health care was involved.¹²⁸

A few cases will serve as illustration. Even before most of these cases were litigated, however, an earlier case dealing with issues involving exit permits raised the question about procedures regarding checkpoints. The petitioner in this case, as in many others discussed in this Article, was the Israeli non-governmental organization Physicians for Human Rights – Israel (PHRI).¹²⁹ When it first brought up the issue of the checkpoints' effect on access to health care, the state answered that, following the petition, a new instruction/procedure had been distributed.¹³⁰ This new directive, dealing with West Bank residents reaching a checkpoint during a medical emergency,

medical services during a curfew imposed in the OPT during the 1991 Gulf War. The matter was obsolete by the time the judgment was given, but the HCJ addressed some of the issues that emerged and determined that the movement of doctors and patients during curfew should be specified in instructions to be issued by the army in both Hebrew and Arabic, which should include full details of modes of action available to patients or their families who would require medical assistance while it was enforced. These instructions should be given to soldiers staffing checkpoints and announced to the residents. HCJ 477/91 PHRI v. Minister of Defense (Apr. 24, 1991), Nevo Legal Database (by subscription) (Isr.). In an additional case dealing with a curfew imposed in Hebron in 2003 following the murder of a Jewish settler, petitioners argued that Palestinian residents had no access to essential medicines and health care. The HCJ held that, when imposing a curfew, the army must take into account its effects on the civilian population's ability to maintain a reasonable life routine. Nevertheless, it held that the curfew's limitation to nights after a time and the interruptions allowing residents access to food, medicines, and essential services indicates that authority was exercised reasonably and the HCJ does not need to intervene. HCJ 854/03 Sultan v. Commander of the Israeli Defense Forces (IDF) in the West Bank (July 9, 2003), Nevo Legal Database (by subscription) (Isr.).

127. Stefanini & Ziv, *supra* note 125.

128. See *infra* Section II.B.1.

129. HCJ 9109/96 PHRI v. Minister of Defense (Mar. 23, 1998), Nevo Legal Database (by subscription) (Isr.).

130. See *id.* ¶¶ 19–21.

was supposed to solve the matter. Yet, three years later, after delays in checkpoints led pregnant women on the way to delivery to lose their babies,¹³¹ the case reached the HCJ again. The petition argued that the army had not implemented the procedure agreed upon in the previous case.¹³² The petitioners demanded that the procedure be internalized and that officers who had not briefed soldiers about it as well as officers and soldiers failing to comply with it be investigated and tried.¹³³ In its reply, the army admitted there had been a flaw and the procedure presented to the HCJ had not been disseminated, noting that an internal army investigation had concluded that the reason for it could have been staff changes.¹³⁴ An order was issued to inform all soldiers of the procedure and to distribute it at the checkpoints.¹³⁵

With the eruption of the Second Intifada and the increasing restrictions on movement within the West Bank, the problems worsened and assumed new forms, especially concerning unstaffed blockings that were challenged in various litigation attempts. In March 2001, the HCJ rejected a petition of PHRI after the army had placed checkpoints in the West Bank and Gaza due to, as described by the HCJ, the “difficult security situation occurring in these territories, as part of the army’s attempts to prevent terrorist attacks.”¹³⁶ The petitioners argued that checkpoints that created closure or “encirclement” prevent the provision of food, medicine, and health services to the population.¹³⁷ They also argued that, despite the army’s commitment to enable emergency passage for medical purposes, this procedure was not implemented and many emergency cases had been forced to wait for a long time at checkpoints.¹³⁸ Often, they had not been allowed to pass at all and had been forced to seek alternative routes.¹³⁹ The HCJ refused to engage with this

131. Ziv, *supra* note 6, at 44–45.

132. HCJ 7517/99 Abed el Salem et al v. Minister of Defense (July 3, 2000), ¶ 2, Nevo Legal Database (by subscription) (Isr.).

133. *Id.* ¶¶ 3–5.

134. *Id.* ¶ 5.

135. HCJ 7517/99 Abed el Salem et al v. Minister of Defense (July 3, 2000), Nevo Legal Database (by subscription) (Isr.).

136. HCJ 9242/00 PHRI v. Minister of Defense (Mar. 21, 2001), ¶ 1, Nevo Legal Database (by subscription) (Isr.).

137. HCJ 7517/99 Abed el Salem v. Minister of Defense (July 3, 2000), ¶ 8, Nevo Legal Database (by subscription) (Isr.).

138. *Id.* ¶ 25.

139. *Id.* ¶¶ 3–10.

petition, holding that the petitioner had drawn a general picture without any factual basis.¹⁴⁰ It cited the army's argument that, under its own policies, each area must have at least one route where soldiers are present.¹⁴¹ It further argued that, according to military procedures that the soldiers were made aware of, passage at these checkpoints should be allowed in all cases of medical necessity.¹⁴² The army admitted there is no guarantee that all soldiers at all checkpoints in all cases do comply with these procedures.¹⁴³ Violations of this procedure, however, if any, should be reported, and the army will then take the necessary measures.¹⁴⁴ On these grounds, the HCJ rejected the petition arguing that the proper way to deal with this matter is to launch individual complaints when procedures are not carried out.¹⁴⁵ With this procedure, the HCJ will then be able to address specific petitions about specific cases if a complaint has not been properly examined. The HCJ further noted that it would be improper for it to order the army to fulfill its own procedures, and also rejected the request to order the army to determine and publish procedures allowing for the regular supply of food and medicine and the free movement of medical teams in the OPT, based on the army's claim that it was its policy to allow for such provision and movement.¹⁴⁶

This judgment, from the beginning of the Second Intifada, highlights the non-intervention route chosen by the HCJ when dealing with attempts at impact litigation seeking to challenge policies restricting freedom of movement and, accordingly, access to health care. The HCJ chose to see such arguments generally, point to army procedures, and suggest individual complaints. It thus dismissed the possibility of a broader examination of the policy and the procedures by rejecting the demand for a specific positive order on freedom of movement regarding access to health care, a pattern that we will see recurring. The problems persisted, however, and more cases date back to that period. Some of them, dealing with specific villages rather than with a generalized petition, point to a pattern: while

140. HCJ 9242/00 PHRI v. Minister of Defense (Mar. 21, 2001), ¶ 2, Nevo Legal Database (by subscription) (Isr.).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* ¶¶ 3–4.

146. HCJ 9242/00 PHRI v. Minister of Defense (Mar. 21, 2001), ¶¶ 5–6, Nevo Legal Database (by subscription) (Isr.).

the case is pending, the army announces it will open up a route. The petition is then rejected given factual changes that occur during the litigation, and the HCJ again refuses to engage in a broader review of the effects of movement restrictions. One such case dealt with a specific village blocked by stone and earth obstacles set up by the army.¹⁴⁷ The village did not have a clinic, forcing the residents to walk or ride a donkey for a few kilometers in order to reach one.¹⁴⁸ The petitioners demanded that an access road be opened to their village and also, more generally, that the army refrain from setting up physical (rather than staffed) barriers in other cases as well.¹⁴⁹ Addressing the case, the HCJ noted that the state's response mentioned that the barrier set up on one route to the village had been removed and the Court was satisfied that this had fulfilled part of the petitioner's demands.¹⁵⁰ As for the broader demand to remove barriers on roads in the area more generally and refrain from setting up physical blocks, the HCJ again found this to be a "general and unspecified" petition lacking a concrete basis that would allow the court to examine it.¹⁵¹ Additionally, the Court said it had taken note of the state's declaration that, if emergency passage was needed, the residents could approach the army's local coordination office and even the State Attorney.¹⁵² As in its previous judgment, the HCJ did not address the right to health under IHL or human rights law. In a very brief decision, it showed satisfaction with the solution of the concrete case (a solution reached under the shadow of the litigation) but refused to leverage the case for a broader statement. Given the extent of such restrictions at the time, the HCJ's refusal to look at the forest rather than at specific trees precluded addressing the wider problem. The notion of calling up the army or representatives of the State Attorney's office in emergency cases is hardly a solution precisely because emergencies, by definition, do not leave time for such calls.

The pattern where a petition can lead to a local remedy or solution was apparent in other cases as well. Those cases stresses the effect of the restrictions on freedom of movement on

147. HCJ 32/01 Aladra v. Commander of the IDF Forces in the West Bank (Jan. 22, 2001), Nevo Legal Database (by subscription) (Isr.).

148. *Id.* ¶ 24.

149. *Id.* ¶¶ 1–2.

150. *Id.* ¶ 1.

151. *Id.*

152. *Id.* ¶ 1.

health care by pointing not only to the limits they place on patients but also on the medical staff, equipment, and ambulances. In the hearings of one of those cases, the state announced it would keep an access road to the village open and the petitioners agreed to withdraw their petition.¹⁵³

The Sisyphean attempts to ease these restrictions continued in another case, dealing with barriers set up by the Israeli Defense Forces (IDF) around three villages near the city of Nablus, which prevented access to the city.¹⁵⁴ The army informed the Court it had opened an alternative route connecting the villages to a checkpoint to their south and from that checkpoint to Nablus.¹⁵⁵ This road, though unpaved, was open to all vehicles.¹⁵⁶ The army also noted two procedures it had instituted instructing soldiers in checkpoints on the treatment of residents seeking medical care and of residents reaching a checkpoint during medical emergencies.¹⁵⁷ The HCJ found these answers satisfactory, citing security concerns, the fact that the state had pointed to Nablus as a hotbed of terrorist activity, and noting that the army's measures were all intended to protect Israelis against terrorism.¹⁵⁸ It did concede that the villagers, though mostly innocent, suffered from a difficult situation, but could not find that the army's actions failed tests of reasonableness or proportionality.¹⁵⁹

Addressing the argument that soldiers at checkpoints do not comply with the orders on the passage of Palestinians seeking medical care, the HCJ claimed this was a general argument it

153. HCJ 32/01 Aladra v. Commander of the IDF Forces in the West Bank (Jan. 22, 2001), ¶ 1, Nevo Legal Database (by subscription) (Isr.); HCJ 3637/01 Shakrana v. Commander of the IDF Forces in the West Bank (Jan. 9, 2002), Nevo Legal Database (by subscription) (Isr.). For a similar case, where the HCJ found that the petition had been exhausted following the army's announcement that it had opened access roads to a village that had previously been physically blocked, see HCJ 2811/01 Riachi v. Commander of the IDF Forces in the West Bank (Apr. 16, 2001), Nevo Legal Database (by subscription) (Isr.). A few days after the ruling, Attorney Nimer Sultani from the Association for Civil Rights in Israel sent letters to the State Attorney's Office, indicating that the commitments to the Court had yet to be fulfilled. Letter from Nimer Sultani, Att'y Assoc. Civil Rights in Israel, to State Att'ys Off., (Apr. 1) (on file with Author).

154. HCJ 2847/03 Alwana v. Commander of the IDF Forces in the West Bank (July 14, 2003), Nevo Legal Database (by subscription) (Isr.).

155. *Id.* ¶ 3.

156. *Id.*

157. *Id.* ¶ 2.

158. *Id.* ¶ 4.

159. *Id.* ¶ 5.

could not address, again avoiding any comprehensive judicial pronouncement.¹⁶⁰ Instead, the Court recommended that the army should continually remind soldiers at checkpoints of the need to act humanely.¹⁶¹

All the cases cited were litigated from 2001–2003. In none of them did the HCJ offer an analysis of the right to health, addressing the relevant provisions on it in IHL or in human rights law. Given the scope of the problems resulting from the restrictions on freedom of movement caused by the encirclement and blocking of villages, the HCJ's refusal to consider this predicament from a broader perspective, either factually or legally, hindered its role in this issue even if, arguably, the fate of some villages was alleviated.

The issue of checkpoints was attacked through the judicial system not only through administrative petitions to the HCJ, but also in a tort claim brought by a West Bank resident who was delayed at an army checkpoint.¹⁶² The claimant, who was the mother of a nine-day-old boy, was with him en route to a hospital in Nablus when they were delayed at a checkpoint.¹⁶³ The baby died on arrival to the hospital.¹⁶⁴ The Court noted the claimant had stated that, although she believed the baby had died because of the delay at the checkpoint, after consulting an expert she had conceded that no causality link could be shown between the delay and the death.¹⁶⁵ Nevertheless, the Court held for the claimant after it found that her claims of delay, brutal behavior by the soldiers, and violence were credible.¹⁶⁶ The Court also awarded her damages, holding she had suffered indirect damages because of her exposure to the suffering and death of her son, and direct damages as she was exposed to violence.¹⁶⁷ This case points to the potential of tort litigation to

160. HCJ 2847/03 Alwana v. Commander of the IDF Forces in the West Bank (July 14, 2003), ¶ 6, Nevo Legal Database (by subscription) (Isr.).

161. *Id.* A similar petition regarding “encirclements” of Bethlehem and Beth Jalla that prevented leaving the towns westward was rejected citing security needs, although the petitioners explained that the blocking had made the hospital adjacent to the affected neighborhoods approachable only after a long and winding detour. *Id.*

162. CC (Jer.) 19956/08 S.K.L.H.V. v. Ministry of Defense (July 5, 2015), Nevo Legal Database (by subscription) (Isr.).

163. *Id.* ¶¶ 1–2.

164. *Id.* ¶ 2.

165. *Id.* ¶ 3.

166. *Id.* ¶ 54.

167. *Id.* ¶¶ 83–93.

tackle restrictions on freedom of movement. Though the scope was limited in this case because of the lack of proved causality, it does suggest a channel that can potentially be used in other cases as well. The tort tool, however, is always ex-post and cannot ease restrictions in real time or undo medical harm or death.

The barriers, encirclement, and checkpoints within the West Bank that had been widespread during the Second Intifada are far fewer now, so litigation about them has also declined. With the recent resurgence of violence in the West Bank, however, some cases have been reported of a siege on Palestinian villages that affected access to health care, including delays and disturbances to the circulation of ambulances.¹⁶⁸

Restrictions on freedom of movement within the West Bank, though reduced, have not disappeared entirely, and cases relating to them still arise. In 2016, the HCJ dealt with a closure imposed by the Israeli army on the city of Yatta, in the Hebron District.¹⁶⁹ This closure was part of various severe restrictions affecting the city's residents after two of them carried out a terrorist attack in Tel Aviv. The petitioners argued that the measures restricted access to two hospitals, two medical centers, clinics, pharmacies, and laboratories that serve some 70,000 residents of the city and about 30,000 living in its vicinity.¹⁷⁰ Not only do these procedures prevent access to medical facilities in the city but they also hinder the transfer of patients from local to outside centers.¹⁷¹ The petitioners noted the violations of prohibitions on collective punishment and various other rights, including the right to freedom of movement, claiming that the closure entails a severe breach of the rights to health and quick access to health services, which are anchored in international human rights law.¹⁷² As often in the past, however, only four days after the filing of the petition, the army began removing the barriers and the petitioners requested that the HCJ cancel the urgent hearing scheduled for two days later, asking to submit a revised notice.¹⁷³ After the last barrier at the entrance to the city

168. See, e.g., Letter from PHRI, to Unite Licensing & Supervising Ambulances (Feb. 28, 2016) (concerning delays affecting the entry of Red Crescent ambulances to Jerusalem hospitals).

169. HCJ 5754/16 Mayor of Yatta v. Commander of the IDF Forces in the West Bank (July 21, 2016), Nevo Legal Database (Isr.).

170. *Id.* ¶ 18.

171. *Id.*

172. *Id.* ¶¶ 22–36, 42–45, 49–52.

173. An urgent request on behalf of the petitioners to cancel the hearing

was removed, both sides agreed to withdraw the petition.¹⁷⁴

As the latter case illustrates, issues similar to those described in this section may come up in the courts again. The current military order on this matter determines that Palestinian residents arriving at a checkpoint (including one leading to Israel) for emergency medical treatment will be allowed to cross even when lacking the permit that is usually required. The commander of the checkpoint, to whom a soldier must report such a case, has discretion on the matter.¹⁷⁵ As in the past, questions about implementation may resurface, but the easing of restrictions on movement *within* the West Bank and the removal of many internal checkpoints have led, as noted, to less litigation on this issue reaching the Court in recent years. Rather than disappearing, however, restrictions on freedom of movement within the West Bank and their effect on health care have mostly been translated into another form, to which I turn next.

2. The Wall

In the early 2000s, Israel began building a wall in the West Bank, which it describes as a “security fence.”¹⁷⁶ Around this time, cases involving the wall became the focus of the HCJ case law dealing with the OPT in general, and with freedom of movement and its effect on access to health care in particular. The HCJ has addressed restrictions on access to health care as part of the problems created by the wall in two related forms.¹⁷⁷ The first involves the route of the wall, which separated people from their health services, and the second concerns the effects of the permits regime dealing with access to health care instituted in the “seam zone.”¹⁷⁸ The “seam zone” is the area between the

scheduled for July 27, 2016. *See id.*

174. *Id.*

175. Coordination of Government Activities in the Territories (COGAT), Treatment of Judea and Samaria Area Resident Reaching Checkpoint in Emergency Medical Situation (Oct. 2014).

176. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 79 (July 9). *See also* Aeyal Gross, *The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 LEIDEN J. INT'L L. 393, 394 n.4 (2006).

177. *See generally* Gross, *supra* note 176, at 402–422 (discussing the two Israeli High Court of Justice cases on the matter).

178. *Id.* at 389 n. 22, 412.

wall and the Green Line; Palestinians residing in it became subject to the permits' regime with the wall's construction.¹⁷⁹

The construction of the wall as such has been addressed not only by the Israeli HCJ but also by the International Court of Justice (ICJ). The ICJ examined Israel's actions and their effect on the lives of Palestinians in the OPT in light of certain provisions of GCIV, the Hague Regulations of 1907, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on the Rights of the Child.¹⁸⁰ The violation of these provisions purportedly infringes the freedom of movement as well as the rights to work, health, education, and an adequate standard of living, besides provisions concerning the protection of property.¹⁸¹ Information that Palestinians living between the wall and the Green Line would be cut off from their land, workplaces, schools, health clinics, and other social services, was pertinent to the ICJ's determination on this matter.¹⁸² The holding that Israel's actions violated not only IHL but also human rights treaties rested on the ICJ's holding that international human rights law applies in occupied territories alongside IHL.¹⁸³

Based on these violations, as well as on its determinations that the wall is illegal since its route "gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements,"¹⁸⁴ and that its construction, together with previous measures, "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect this right,"¹⁸⁵ the ICJ found that the building of the wall in the OPT is illegal.¹⁸⁶ By contrast, the Israeli HCJ has refrained from such a statement, holding instead that the Israeli army was within its authority when building the wall in the OPT given its power to act for security purposes.¹⁸⁷ The debate on cases on the wall in

179. *Id.* at 412.

180. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 137 (July 9).

181. *Id.* ¶ 123–37.

182. *Id.* ¶ 133.

183. *Id.* ¶ 114.

184. *Id.* ¶ 122.

185. *Id.*

186. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 159 (July 9).

187. See, e.g., HCJ 2056/04 Beit Sourik Village Council v. Israel 58(5) PD

the Israeli HCJ, then, has focused mostly on whether restrictions of Palestinian rights in specific segments or particular measures adopted in the context of building the wall have been proportional.

This Article will address only some of the many HCJ cases concerning the wall, where access to health care arguments played a central role.¹⁸⁸ Generally, five stages can be identified in the HCJ's case law on the matter. (1) Before the General Assembly requested the ICJ to issue the Advisory Opinion, the HCJ had issued brief judgments holding it would not interfere in the matter based on the principle of deferring to security considerations.¹⁸⁹ (2) *Beit-Sourik*, issued in 2005 several days before the Advisory Opinion, was the HCJ's first major judgment on the topic.¹⁹⁰ The HCJ held that building the wall in the OPT was legal but that the segment examined in the decision was illegal on grounds of proportionality.¹⁹¹ (3) *Mara'abe*, issued in 2006 after the Advisory Opinion and repeating the logic of *Beit Sourik*, also held that protecting the settlements amounted to a legitimate security consideration that could justify building the wall.¹⁹² (4) Post-*Mara'abe* decisions where, except for cases where the wall had clearly been built to protect settlement expansion, the HCJ approved various segments (unlike in its landmark decisions in *Beit Sourik* and *Mara'abe*), arguing that the restrictions of movement were less severe than in those two cases.¹⁹³ Notably, in some of the cases discussed after *Mara'abe*, the route of the wall was changed as part of an out-of-court settlement between the parties.¹⁹⁴ (5) The complex regime of permits in force in the "seam zone," which is used to regulate the lives of Palestinians, was upheld by the HCJ as an integral part

807 (2004) (Isr.), *translated in* 38 ISR. L. REV. 83 (2005).

188. For a broader discussion, see GROSS, *supra* note 4, at 265–337. *See also* Gross, *supra* note 176.

189. HCJ 8172/02 Ibrahim v. IDF Commander in the West Bank (unpublished, 2002); HCJ 3771/02 Local Council of A-Ras Village v. Military Commander of Judea and Samaria (unpublished, 2002); HCJ 3325/02 Rashin Chasan (Kraos) v. Military Commander of Judea and Samaria (unpublished, 2002), GROSS, *supra* note 4, at 430–431.

190. HCJ 2056/04 Beit Sourik Village Council v. Israel 58(5) PD 807 (2004) (Isr.).

191. *Id.* ¶ 85.

192. *See* HCJ 7957/04 Mara'abe v. Prime Minister of Israel (Sep. 15, 2005), Nevo Legal Database (by subscription) (Isr.).

193. *See, e.g.*, HCJ 4387/06 Mas-ha Village Council v. Prime Minister (Apr. 11, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

194. *See, e.g., id.* ¶ 2.

of the wall, arguing that its effects would be more adequately dealt in localized petitions.¹⁹⁵

To illustrate this trajectory, several cases specifically concerned with access to health care will be cited in more detail. In *Mara'abe*, one of the two "landmark cases,"¹⁹⁶ the HCJ held that the route of the wall in the area discussed had created a "chokehold" over a number of Palestinian villages.¹⁹⁷ Among the wall's detrimental effects on their lives, the petitioners mentioned that they depended on health services from which the wall had now separated them.¹⁹⁸ The wall did have gates, but they opened only at certain hours, making the villagers' trip to the nearby governmental hospital much longer.¹⁹⁹ The HCJ cited in its judgment an expert opinion that, *inter alia*, noted that the wall had detached the villages in the area from health services, that the medical care provided in the villages was now partial and irregular, and that the access of emergency vehicles had been badly affected.²⁰⁰ The petitioners argued that, in these circumstances, the right to health had been disproportionately violated.²⁰¹ The HCJ accepted this argument, pointing out that no hospitals or clinics existed in the villages affected by the wall in that area and that the movement of doctors and ambulances to the villages had been seriously disrupted, without any solutions offered for emergencies.²⁰²

But *Ma'arabe*, as noted, was the exception to the rule. In most subsequent cases, the HCJ refused to intervene, even if the wall was occasionally rerouted during the litigation. In 2006, for example, the HCJ rejected a petition concerning a wall segment built near two Palestinian villages.²⁰³ The petitioner, a resident from one of the villages, claimed that, because of delays, her twin girls had been born at the checkpoint in her village and had died.²⁰⁴ The army agreed to reroute the wall while the litigation

195. GROSS, *supra* note 4, at 265–337.

196. See Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy*, 24 L. & SOC'Y REV. 781 (1990).

197. HCJ 7957/04 *Mara'abe v. Prime Minister of Isr.* (Sep. 15, 2005), ¶ 113, Nevo Legal Database (by subscription) (Isr.).

198. See *id.* ¶¶ 60–69.

199. *Id.* ¶¶ 54–58.

200. *Id.* ¶ 79.

201. *Id.* ¶ 81.

202. *Id.* ¶ 104.

203. HCJ 6336/04 *Yousef Mousa v. Prime Minister of Isr.* (Jan. 10, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

204. *Id.* ¶ 3.

was pending but the petitioners argued that the new course still detached the village from some of its lands.²⁰⁵ The HCJ, however, refused to intervene and ruled that the new route was within the army's "zone of proportionality."²⁰⁶ The litigation, however, was still somewhat helpful to the petitioners, whom the Court cited as agreeing that the wall's negative effect on their "web of life" had been significantly narrowed after the rerouting.²⁰⁷

In other cases, petitions were rejected even without adopting any changes. For example, a 2006 petition concerning the wall's route in another area of the West Bank claimed that it prevented access from the villages to neighboring cities and violated many of the residents' rights, including the right to health.²⁰⁸ The HCJ again declined to intervene and found that the building of the wall in that area, beside the army's commitment to ensure the Palestinian residents' access to the main cities, was justified and met proportionality tests.²⁰⁹ Similar rulings were issued in other cases.²¹⁰ The HCJ thus intervened in a few exceptional instances, while agreements on changes were reached in its shadow in a few others.²¹¹ Generally, however, the HCJ upheld the building of the wall, thus legitimizing the attending restrictions on freedom of movement.²¹² Its discussion of the wall, then, was fragmented into various petitions, each considering a specific segment, unlike that of the ICJ, which had looked at the wall as a whole.²¹³ By the time the HCJ came to deal with a petition submitted against the wall in general, the arguments raised in it had become irrelevant.²¹⁴ The HCJ's examination of each case

205. *Id.* ¶ 4–5.

206. *Id.* ¶ 9.

207. *Id.* ¶ 5.

208. HCJ 2942/05 Dr. Mansur v. Israel (Oct. 26, 2006), ¶ 12, Nevo Legal Database (by subscription, in Hebrew) (Isr.).

209. *Id.* ¶ 34.

210. *See, e.g.*, HCJ 4387/06 Mas-ha Village Council v. Prime Minister (Apr. 11, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

211. *See* Yoav Dotan, *Pre-HCJ Procedures and Constitutional Dilemmas about the Role of the State Attorney's Office in the High Court of Justice*, 7 MISHPAT UMIMSHAL 159 (2004) (discussing the effect of the HCJ's shadow on OPT litigation generally).

212. *See* GROSS, *supra* note 4, at 325–337.

213. *Id.* at 306–307.

214. HCJ 9961/03 Hamoked: Center for the Defense of the Individual v. Israel (Apr. 5, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.). *See also* GROSS, *supra* note 4, at 269–70.

separately did enable it to distinguish between more and less severe cases but, without addressing the problem as a whole, the issue became mostly one of proportionality.²¹⁵ In this model of analysis, freedom of movement generally, and for health needs specifically, can be denied so long as it is “proportional” to security needs. This model, however, fails to take into account the bigger picture not only of the wall but also of the occupation in general—security is allocated to one side only and, in its name, rights are denied. The problem is not the wall per se but a regime that allows restrictions on the civilians’ right to freedom of movement, including for health purposes, which a proportionality analysis can perhaps help to alleviate but cannot resolve. The HCJ, which did not agree to look at the bigger picture of the wall, certainly avoided looking at the even bigger picture of the occupation regime as a whole.²¹⁶

A rather exceptional instance of intervention is a case involving a measure similar to the wall but not quite *the* wall. The HCJ accepted a petition of Palestinian residents opposing the building of a concrete railing alongside a road meant to protect settlers who use it.²¹⁷ The HCJ noted that the railing would affect about five thousand residents from nearby villages, restricting their access to basic services in neighboring urban centers and violating their rights, including the right to health.²¹⁸ The HCJ held that the military commander could have achieved the same security purposes by resorting to other measures, and the restrictions on rights were therefore disproportionate.²¹⁹

Several cases involved the building of the wall in Jerusalem and the immediate vicinity, where the wall’s route often removes neighborhoods from the city and from work venues as well as from vital education and health services.²²⁰ These decisions

215. For a detailed discussion, see *Id.* at 265–337.

216. For a discussion of the need to address the legality of the occupation itself, see Orna Ben-Naftali, Aeyal Gross & Keren Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 BERKELEY J. INT’L L. 551 (2005); GROSS, *supra* note 4, at 17–51.

217. See HCJ 1748/06 Mayor of ad-Dhahiriya v. Commander of the IDF Forces in the West Bank (Dec. 14, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

218. *Id.* ¶ 17.

219. *Id.* ¶¶ 21–22.

220. For discussions of the wall’s effect on Palestinians in Jerusalem, see B’TSELEM, A WALL IN JERUSALEM: OBSTACLES TO HUMAN RIGHTS IN THE HOLY CITY (2006), www.btselem.org/sites/default/files2/publication/200607_a_wall_in_jerusalem.pdf; Merav Amir, *On the Border of Indeterminacy: The Separation*

attest to the special problems resulting from the building of the wall within Jerusalem, given that the partition splits not only the OPT but also the purportedly united city. The separation of East Jerusalem from the West Bank entails wider consequences as well because some of the main Palestinian hospitals serving the West Bank are in Jerusalem.²²¹

Due to Israel's annexation of East Jerusalem after the 1967 war, the city's Palestinian residents are considered residents of Israel and can thus enter any part of Israel,²²² but the wall now separates even some of these citizens from the city. Health is only one aspect of the West Bank's detachment from what is the major city in the region, as a result of Israeli policies.²²³ The HCJ recognized in some cases that the wall cut off Palestinian petitioners from territorial continuity with other parts of Jerusalem, but found the arrangement proportional. For example, petitioners argued in one case that the wall built within Jerusalem leaves them on the West Bank but leaves most of the services that they depend on in Jerusalem, violating their rights to freedom of movement, to medical care, and many others.²²⁴ The HCJ held in this case that the arrangement was proportional, resting this determination mainly on the state's consent to allow passage continuously for pedestrians and during the daytime for vehicles.²²⁵ In another case, the HCJ recognized that a wall within the Jerusalem area would require A-Ram neighborhood residents to pass through security checks as they entered Jerusalem daily to work and to use public services, as well as on their return.²²⁶ The petitioners pointed out they would be detached from health services, including the

Wall in East Jerusalem, 16 GEOPOLITICS 768 (2011); Tovi Fenster & Oren Shlomo, *In the Shadow of the Wall and Separation: Everyday Life in East Jerusalem*, 17 PALESTINE-ISR. J. (2011).

221. See, ZIV, *supra* note 6, at 71–72.

222. See Law and Administration Order (no.1), 5727-1967, KT 2064 p. 2690. See also Basic Law: Jerusalem, Capital of Israel, 5740-1980, SH No. 980 p. 186. See HCJ 282/88, Awad v. Yitzhak Shamir, Prime Minister and Minister of Interior (June 5, 1988), ¶ 10, Nevo Legal Database (by subscription) (Isr.).

223. See, PHRI, A WALL IN ITS MIDST: THE SEPARATION BARRIER AND ITS IMPACT ON THE RIGHT TO HEALTH AND ON PALESTINIAN HOSPITALS IN EAST JERUSALEM (2005).

224. HCJ 1073/04 Salameh v. Head of IDF Center Command (Aug. 6, 2006), ¶ 3, Nevo Legal Database (by subscription, in Hebrew) (Isr.).

225. *Id.*

226. HCJ 5488/04, Al-Ram Local Council v. Israel (Dec. 13, 2006), ¶ 25, Nevo Legal Database (by subscription) (Isr.).

hospitals they use in East Jerusalem.²²⁷ They argued that in the neighborhoods north of Jerusalem to be detached by the wall, including A-Ram, there is not even one hospital.²²⁸ Although the Israeli Health Fund branches that they use as Israeli residents will remain accessible to them, they do not provide the services supplied by the Jerusalem hospitals from which they will now be separated.²²⁹ The HCJ conceded that the obstacles in their access to Jerusalem infringed the petitioners' right to health.²³⁰ In its ruling, however, the HCJ found that the security advantages of the wall's planned route placed the balance struck by the army within the "proportionality zone," and noted the importance of developing alternative medical services on the side of the petitioners' residence.²³¹ It also mentioned that Palestinians would be allowed to enter Jerusalem for medical services based on permits issued by the Israeli Civil Administration according to existing criteria,²³² and that the Israeli Ministry of Health would encourage the Health Funds to act also "beyond the fence."²³³

In other cases involving the building of the wall in the Jerusalem area, Palestinian petitioners pointed to enclaves created by the wall that they argued were similar to the one that had been held to be disproportional in *Mara'abe*.²³⁴ The HCJ rejected this argument pointing to the so-called "web of life roads"—special roads that the army had determined that Palestinians living in villages affected by the wall could use to reach the municipal centers of Ramallah and Jerusalem.²³⁵ The petitioners pointed out that access to their main municipal center in Jerusalem through these roads would create a detour and require crossing an Israeli checkpoint involving a 30-45

227. *Id.*

228. *Id.* ¶ 69.

229. See HCJ 6080/04, Masalmani v. Prime Minister (May 18, 2006), ¶¶ 68–69, Nevo Legal Database (by subscription) (Isr.)

230. HCJ 5488/04, Al-Ram Local Council v. Israel (Dec. 13, 2006), ¶ 49, Nevo Legal Database (by subscription) (Isr.)

231. See *id.* ¶¶ 51–60.

232. *Id.* ¶ 8.

233. *Id.* ¶ 9 (noting that according to the HCJ's analysis, Israeli law rather than the international law of occupation applies to the wall segments built within Jerusalem, but the HCJ held that, despite the differences, similar legal principles guide both legal regimes); see also *id.* ¶ 46.

234. HCJ 4289/05 Local Authority Bir Nabala v. Israel (Nov. 26, 2005), Nevo Legal Database (by subscription) (Isr.).

235. *Id.* ¶¶ 44–45.

minute wait.²³⁶ Nonetheless, the HCJ held this route as proportional even though the wall also separated villages from their lands and required crossing gates in order to access them.²³⁷

In some cases, appeal committees that dealt with land confiscations for the purpose of building the wall in East Jerusalem decided that some of the chosen locations disproportionately violated rights, including the right to health care.²³⁸ The effect of these cases on the overall picture, however, seems limited.²³⁹

Finally, a judgment dealing with the permit regime associated with the wall deserves mention. The HCJ ruled in 2011 on a general petition directly challenging the permits regime instituted for the “seam zone.”²⁴⁰ This regime requires Palestinians to hold residency cards (given for up to a renewable two years) in order to live in their own homes, governs entry and exit into the “seam zone” (even for residents), and issues short or long term “personal” permits to enter the area for specific needs to Palestinians who are not residents.²⁴¹ The petitioners argued that the permits regime was dispossessing the local population and annexing land for political purposes, discriminating against Palestinians, and restricting the rights of the Palestinian population in disproportionate fashion, including the right to health.²⁴² The HCJ reiterated its holding in *Beit Sourik* and *Mara’abe*, stating that the barrier was being built for security purposes and that the permits regime in the “seam zone” complemented the security purposes at the heart of the barrier itself.²⁴³ Moving on to the violations of the population’s rights and without specifically addressing health beyond the citing to the petitioners’ arguments, the HCJ held

236. *Id.* ¶ 42.

237. *Id.*

238. *See, e.g.*, Appeals Committee (Tlv.) 556/04 Abed al-Fattah v. General Director of the Ministry of Defense (July 16, 2006), Nevo Legal Database (by subscription) (Isr.).

239. *See* sources cited *supra* note 220.

240. HCJ 9961/03 Hamoked: Center for the Defense of the Individual v. Israel (Apr. 5, 2011), ¶ 10, Nevo Legal Database (by subscription) (Isr.).

241. For a description of this regime, *see* HAMOKED, THE PERMIT REGIME: HUMAN RIGHTS VIOLATIONS IN THE WEST BANK AREAS KNOWN AS THE “SEAM ZONE” (2013); SHAUL ARIELI & MICHAEL SFARD, HOMAH U-MEHDAL [THE WALL OF FOLLY] 172–195 (2008).

242. HCJ 9961/03 Hamoked: Center for the Defense of the Individual v. Israel (Apr. 5, 2011), ¶ 10.

243. *Id.* ¶¶ 12–17.

that the picture portrayed by the petitioners was indeed harsh insofar as people's access to their lands was concerned.²⁴⁴ The military commander, however, had nonetheless exercised his authority legally, with his actions passing the proportionality test used in the previous case law.²⁴⁵ While the HCJ pointed to several changes it considered necessary in order to ease life for those in the "seam zone" or wishing to enter it,²⁴⁶ it upheld the regime and rejected the petition. In addressing the gap between the "harsh picture" that had been presented to it and its rejection of the petition, the HCJ noted that the petition's "generality" had been detrimental to its cause.²⁴⁷ Its failure to address the fate of specific areas along the route of the "seam zone" had hindered assessment of the situation in detail, as the HCJ had done in dozens of previous petitions dealing with specific segments of the barrier.²⁴⁸

Once more, then, the HCJ opted for the "separation" route, basing its rejection of the petition on the petitioners' attempt to present the big picture and encouraging a type of litigation that sees the trees but not the forest. This approach, as this section has shown, allows for an analysis that ultimately legitimizes the separation barrier and the regime associated with it. The HCJ had endorsed a similar approach in the litigation dealing with the checkpoints: a refusal to deal with a generalized and principled petition, which may help to alleviate specific local problems but appears to legitimize the regime as a whole. The effects on access to health care continue to be felt. To cite only one example, consider the case of twenty-one-year-old Adel Omar, a resident of Azun, a Palestinian village locked in the seam zone where the route of the wall had been planned so as to protect a few settlements.²⁴⁹ Omar was injured in an accident, but the wall separated him from the nearest hospital in Qalqiliyah and the gate was closed at night. Omar's friends had to argue with the soldiers for over an hour to persuade them to open the gate and let him through, by the time they reached the

244. *Id.* ¶ 3.

245. *Id.* ¶ 42.

246. *Id.* ¶¶ 36, 39, 47.

247. HCJ 9961/03 Hamoked: Center for the Defense of the Individual v. Israel (Apr. 5, 2011), ¶ 34, Nevo Legal Database (by subscription) (Isr.).

248. *Id.*

249. Gideon Levy, *Express Shel Hatzot* [*Midnight Express*], HAARETZ (Feb. 27, 2007), <http://www.haaretz.co.il/misc/1.1390703>. Following the publication of this article, the army agreed to keep this specific gate open 24 hours a day. *Id.*

hospital, Omar was dead.²⁵⁰ This is only one revealing instance of the wall's harmful effects on access to health care.²⁵¹

3. Exit Permits

Unlike the two previous categories of cases pertaining to movement *within* the West Bank (and Gaza), the cases discussed in this section deal mostly with Palestinians who need to exit the OPT for medical treatment. A number of scenarios are possible—a need to exit the OPT for treatment in Israel (including, from Israel's perspective, in East Jerusalem) or in another country; a need to exit Gaza (especially after the 2005 “disengagement”) for medical treatment in the West Bank, in Israel, or in another country. The need for exit permits is most common among residents of the West Bank and Gaza who are referred for treatment in East Jerusalem, home to three of the six most advanced Palestinian hospitals.²⁵² In many other cases, patients from Gaza are referred for treatment in the West Bank and require a permit to go through Israel.²⁵³ Tens of thousands of Palestinians are also referred to facilities outside the OPT if means for appropriate treatment are unavailable within it, requiring them to travel to Jordan, Egypt, or Israel.²⁵⁴

Current policies and procedures will be described below in detail but, usually, obtaining a permit means submitting an application (including medical documents) to the Israeli coordination and liaison authorities, which decide whether to approve it.²⁵⁵ Other cases deal with the movement of medical teams and medical students rather than of patients. Cases are

250. *Id.*

251. For detailed discussion of these effects see U.N. OFF. OF COORDINATION OF HUMANITARIAN AFFAIRS & WHO, *THE IMPACT OF THE BARRIER ON HEALTH, SPECIAL FOCUS* (2010), http://www.emro.who.int/images/stories/palestine/documents/pdf/ocha_opt_special_focus_july_2010_english_2.pdf?ua=1; see also MEDICAL AID FOR PALESTINIANS (MAP), *TEN YEARS SINCE THE INTERNATIONAL COURT OF JUSTICE RULING: THE IMPACT OF THE SEPARATION WALL ON THE RIGHT TO HEALTH* (2014), <https://www.map-uk.org/downloads/reports/the-impact-of-the-separation-wall-on-the-right-to-health-----map.pdf>.

252. PHRI, #DENIED – HARASSMENT OF PALESTINIAN PATIENTS APPLYING FOR EXIT PERMITS, 9 (2015).

253. *Id.*

254. *Id.*

255. *Id.* at 22. See also WORLD HEALTH ORGANIZATION, *RIGHT TO HEALTH: CROSSING BARRIERS TO ACCESS HEALTH IN THE OCCUPIED PALESTINIAN TERRITORY* 2014-2015, http://www.emro.who.int/images/stories/palestine/documents/WHO_-_Access_Report_2014-15_-Final.pdf?ua=1.

thus divided into three categories: exit from the West Bank (and pre-disengagement Gaza), exit from (post-disengagement) Gaza, and exit of medical teams and students.

a. Exit from the West Bank (and Pre-Disengagement Gaza)

In an early case, PHRI petitioned against the lack of clarity in the army's criteria and procedures concerning patients' requests for permits to exit the OPT.²⁵⁶ The state answered that, following the petition, a new procedure had been instituted on the matter and the petition was erased by agreement.²⁵⁷ But just as the matter of checkpoints and the procedures surrounding them (addressed in the same petition) reached the HCJ again, as noted, the matter of patients' exit permits also returned to the Court. Less than a decade after the first round, PHRI petitioned the HCJ again and argued that the procedures adopted by the army in 2001 following its petition had not been fulfilled.²⁵⁸ The new petition pointed to a number of faults, of which the main two were the state's failure to meet the requirement of submitting a medical opinion every time it denied an exit permit for medical reasons, and the failure to abide by the timetable prescribed in the procedure for regular and urgent exit permit requests.²⁵⁹ The state argued it had followed the procedure but would improve some of its elements, as follows: it would justify its denials of requests,²⁶⁰ it would computerize the system to allow the tracking of requests,²⁶¹ and it would regularly provide information on the possibility of appealing a denied request.²⁶² The state also explained it was not required to provide a medical opinion when the refusal was based on security rather than on medical grounds, which was indeed the basis for most refusals.²⁶³ The state also added it was aware of the need for a swift answer, even if one was not always possible,²⁶⁴ and noted

256. See HCJ 9109/96 PHRI v. Minister of Defense (Dec. 12, 1996).

257. *Id.*

258. HCJ 7094/05 PHRI v. COGAT (Apr. 27, 2010), ¶¶ 6–9, Nevo Legal Database (by subscription) (Isr.).

259. *Id.* ¶¶ 6–9.

260. *Id.* ¶ 22.

261. *Id.* ¶ 35.

262. *Id.* ¶14.

263. *Id.* ¶ 17.

264. HCJ 7094/05 PHRI v. COGAT (Apr. 27, 2010), ¶ 18, Nevo Legal Database (by subscription) (Isr.).

it would consult a physician when refusing a request.²⁶⁵ Answers would be sent within a week unless the request was rejected on security grounds, and no later than three days before the requested exit date.²⁶⁶ Security considerations, however, could delay the process.²⁶⁷

After a long delay in dealing with the case pending before it, the HCJ summarized the issues by emphasizing the humanitarian importance of medical treatment for those in need of it—be they residents and citizens of Israel, of another country, or even enemy nationals—while also stressing the wide margin of discretion the state enjoyed in this regard.²⁶⁸ It held that, while the petition was being heard, many of the matters pointed out by the petitioners had been answered satisfactorily.²⁶⁹ The state, the HCJ held, is attentive to the need for processing exit permits more efficiently.²⁷⁰ Timetables, however, remained a controversial topic. The HCJ found that the army standard requiring requests to be in no more than fourteen working days before the exit and replies to be given no more than five days before the date of the requested exit was reasonable, and rejected the petition.²⁷¹ In another case, a refusal on security grounds that the HCJ found persuasive, the petitioner withdrew his petition. This case dealt with a request to allow a cancer patient, a 36-year-old Palestinian from Al Habala village in the Qalqiliya area, to enter Israel for a bone marrow test at Hadassah Hospital.²⁷² The patient's last request was denied for security reasons and a request sent to the Military Legal Advisor

265. *Id.* ¶ 17.

266. *Id.* ¶ 22.

267. *Id.* ¶¶ 22-29.

268. *Id.* ¶¶ 30-33.

269. *Id.* ¶ 35.

270. HCJ 7094/05 PHRI v. COGAT (Apr. 27, 2010), ¶ 35, Nevo Legal Database (by subscription) (Isr.).

271. *Id.* ¶¶ 34-40. Another petition concerning problems in the implementation of this procedure was erased by agreement in HCJ 5732/06 PHRI v. COGAT, Judgment (July 27, 2006), Nevo Legal Database (by subscription) (Isr.); in HCJ 5732/06 PHRI v. COGAT, Petition (July 27, 2006), Nevo Legal Database (by subscription) (Isr.). For cases where, following a petition, the army allowed entry to Israel for treatment and said it would examine further requests of the same patient on its merits pending no security preventing circumstances, see the Respondent's and the Petitioner's answers in HCJ 10642/03 Barghouthi v. IDF Commander in Gaza, which led to the deletion of the petition, and ¶¶ 10-22 to the following petition (HCJ 10642/04 Barghouthi v. IDF Commander in Gaza).

272. HCJ 2058/04 Charov v. Commander of the IDF Forces in the West Bank (Mar. 4, 2004), Nevo Legal Database (by subscription) (Isr.).

was not answered.²⁷³ The state argued that, according to recent intelligence information, the petitioner was not allowed to enter Israel but could go to Jordan if he wished.²⁷⁴ When the HCJ decided that the security materials presented ex parte showed that the petitioner could pose a risk if he entered Israel, his lawyer agreed to withdraw the petition.²⁷⁵

Another case dealt with a resident of the West Bank who asked for an exit permit to accompany his wife, a resident of Jaffa in Israel, for his son's birth.²⁷⁶ The authorities had forbidden him entry "on criminal grounds," claiming he had previously stayed in Israel without authorization.²⁷⁷ He could not stay in Israel with his wife since an Israeli law prevents Palestinians from the OPT obtaining residency in Israel even if married to an Israeli citizen.²⁷⁸ The baby was born without his presence. After the petition to the Court, the army agreed to allow him entry and, eventually, to change the procedures too so as to allow fathers to accompany their partners during the birth of their children.²⁷⁹ This arrangement, which took on the status of a judicial verdict, stated that the procedure for approving Palestinians' requests for permits to obtain medical treatment and accompany patients would be amended to state "including a woman giving birth."²⁸⁰

The current military order determines that West Bank residents should be allowed, barring security grounds, to obtain medical treatment in the OPT, in Israel, or abroad.²⁸¹ The order covers movement from the OPT to Israel and abroad at "routine" times as well, as during full closure of the OPT, internal closure, or "encirclement" of a certain area.²⁸² (This procedure is separate from the one discussed above, which dealt with emergency cases

273. *Id.*

274. *Id.*

275. *Id.*

276. Administrative Appeal (Jer.) 41011-11-14 John Doe (Mar. 16, 2015), Nevo Legal Database (by subscription) (Isr.). For a discussion, see PHRI, *supra* note 252, at 18.

277. Administrative Appeal (Jer.) 41011-11-14 John Doe (Mar. 16, 2015), ¶ 12.

278. The Citizenship and Entry into Israel Law (temporary provision), 5763-2003, (Isr.).

279. See PHRI, *supra* note 252, at 18.

280. Administrative Appeal (Jer.) 41011-11-14 John Doe v. (Mar. 16, 2015).

281. COORDINATION OF GOVERNMENT ACTIVITIES IN THE TERRITORIES (COGAT), HANDLING REQUESTS OF RESIDENTS OF THE TERRITORIES SEEKING MEDICAL TREATMENT (2014).

282. *Id.* ¶ 1(d).

of Palestinians reaching checkpoints within the West Bank). It specifically states that it is based on the state's commitment to the HCJ, highlighting the central role that litigation played in this matter.²⁸³ Moreover, it may also indicate that in this context (unlike that of the checkpoints and the wall), the HCJ agreed to hear and decide on a generalized petition, allowing for actual policy change through impact litigation rather than merely alleviating some individual or local circumstances.²⁸⁴ The order contains forms that West Bank residents seeking exit permits to Israel for medical treatment must fill out and the modes of submitting them.²⁸⁵ It also notes that no permit is needed to exit abroad for medical treatment via Jordan except for cases involving security reasons, though residents can still apply under this procedure even if such reasons exist.²⁸⁶ Requests must include updated medical records and an invitation by the medical institute in Israel or abroad, and also in the West Bank if the request entails movement within the West Bank at times of internal restrictions.²⁸⁷ The order notes that requests would be processed as quickly as possible given the importance of medical treatment.²⁸⁸ Generally, then, during "routine" times, requests will not be denied if a medical problem is indeed present and an invitation by a medical institution in Israel is included, all so long as the person is not prevented (on security grounds) from entering Israel. For "exceptional reasons," the request may be approved even if one of the conditions is not fulfilled.²⁸⁹ Additionally, reasons must be given for all denials.²⁹⁰ The order also states that when the Israeli army imposes a general closure on certain areas or when the request pertains to someone who is denied entry into Israel for security reasons, the permit will still be approved if it is urgent and/or if it concerns a lifesaving treatment unavailable in the West Bank, such as radiation, transplants, cardiac catheterization, and dialysis for children.²⁹¹ Such requests will be refused on security grounds only after considering all the alternatives, and refusals must be

283. *Id.*

284. *Id.*

285. *Id.* ¶ 3.

286. *Id.* ¶ 3(b).

287. *Id.* ¶ 3(c).

288. *Id.* ¶ 3(d)(4).

289. *Id.* ¶ 3(e)(2).

290. *Id.*

291. *Id.* ¶ 3(f)(1).

justified.²⁹² At times of internal closure within the West Bank, a person scheduled for medical treatment within the West Bank will generally be allowed to exit.²⁹³ The rules in force are similar to those stated above.

Further rules deal with exceptional requests concerning traveling abroad through the Israeli airport to Palestinians who are refused entry to Israel, which will usually not be approved unless pertaining to an emergency treatment unavailable in the area.²⁹⁴ Additionally, the “permits status” document issued by the army in 2016 lists three purposes of entry for medical reasons: medical reasons for cancer and dialysis patients, patients with chronic diseases, and invitations from hospitals; accompanying a hospitalized or chronically ill family member, and visiting a sick family member.²⁹⁵

An additional IDF procedure, published in October 2017, determines a twenty-three-day period (not including holidays and weekends) for processing health-related permits for Gaza residents,²⁹⁶ while also stating that permits will be processed immediately in urgent cases (“life-saving” situations).²⁹⁷

These rules, and especially the procedures for submitting exit permits requests, reveal a bureaucratic structure that, barring security considerations, holds that exit for medical treatment should generally be allowed. This structure does show the effects of litigation while also pointing to the limits of the humanitarian arrangement where the Palestinians’ basic right to freedom of movement for any purpose, in this case for health, depends on the occupier’s willingness to establish a bureaucratic-humanitarian regime. This is obviously better than a policy that generally forbids exit, but also points to the basic problem of movement restrictions and dependence on a

292. *Id.* ¶ 3(f)(2).

293. *Id.* ¶ 3(g)(1).

294. *Id.* ¶ 3(h).

295. COORDINATION OF GOVERNMENT ACTIVITIES IN THE TERRITORIES (COGAT), STATUS OF UNCLASSIFIED PERMITS FOR PALESTINIAN ENTRY INTO ISRAEL FOR THEIR PASSAGE BETWEEN JUDEA AND SAMARIA AND THE GAZA STRIP AND FOR THEIR DEPARTURE ABROAD (2016).

296. This also includes accompanying patients and traveling abroad for medical treatment. The procedure also dictates a fifty-day period for processing permits to visit a sick family member (in the West Bank and in Israel), and a seventy day period for permits to participate in medical training courses outside the Gaza Strip. *See* COORDINATION OF GOVERNMENT ACTIVITIES IN THE TERRITORIES (COGAT), HANDLING REQUESTS FOR PERMITS FOR PALESTINIANS LIVING IN THE GAZA STRIP (2017).

297. *Id.*

permit for what should be a basic human right.

b. Exit from Post-Disengagement Gaza

In the generalized case dealing with exit permits discussed in the previous section, the distinction became apparent between the West Bank and Gaza. The petition was submitted in 2005 but the judgment was issued in 2010, and the disengagement occurred while it was pending.²⁹⁸ The HCJ cited the state's response clarifying that, even before 2005, the procedure that applied regarding Gaza residents was different from the one in the West Bank.²⁹⁹ Regarding the West Bank, the inclination was to approve requests for medical treatment in Israel in the absence of security reasons.³⁰⁰ Regarding Gaza, however, deeper probes were conducted and, because of the higher security risks, options for alternative treatment were examined.³⁰¹ The HCJ held that, after the disengagement, the Israeli military commander is no longer present in Gaza and requests must be addressed to the Israeli Ministry of Interior.³⁰² However, the procedure stipulated in the order de facto applies to Gazans too, even if they have no right to enter Israel.³⁰³ But, the army noted that circumstances in Gaza after the rise of the Hamas government preclude implementation of a rigid timetable for answering exit permits requests.³⁰⁴ In another decision pertaining to Gaza residents that wanted to enter Israel for medical treatment, the HCJ held that, after the end of the military administration, authority to allow Gazans to enter Israel rests with the Israeli Minister of Interior.³⁰⁵ This points to the perception of post-disengagement Gaza as a foreign entity rather than as occupied territory, a perception supposedly imposing fewer duties on Israel.³⁰⁶

298. *Id.* ¶ 11.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* ¶ 20.

303. *Id.* ¶¶ 19–20.

304. *Id.* ¶ 20.

305. HCJ 4487/08 Physicians for Human Rights v. IDF Commander in Gaza 63(1) PD 149 (2008) (Isr.).

306. *Id.* ¶ 6.

The effects of this view of Gaza as a territory beyond Israel's responsibility is apparent in cases involving the movement of Gaza residents, especially when they wish to enter Israel. Although entry from the OPT into Israel has been limited, in different forms, since the early 1990s, the disengagement allowed the HCJ to deal with them as requests by residents of an enemy state rather than as individuals to whom Israel, as an occupying power, owes a special duty. For example, in a case involving a Gaza resident seeking to enter Israel for essential chemotherapy, the HCJ accepted the state's denial of the request because he was claimed to pose a security threat.³⁰⁷ The HCJ approached the request as if the petitioner were from a foreign country and, indeed, an enemy country, to be handled by Israel strictly on a voluntary humanitarian basis.³⁰⁸ This patient was nevertheless allowed to enter Israel for medical treatment contingent on a security guard being attached to him—at his expense.³⁰⁹ The petitioner argued that he required the special expertise available at Israeli hospitals but the HCJ held that, although providing lifesaving medical treatment is a meaningful humanitarian value, it does not override other important interests, especially the protection of public security.³¹⁰ Allowing a “foreign resident” to enter Israel for medical treatment is a matter within the discretion of the Israeli government, and each case should be examined individually while taking all considerations into account. The state should balance the need to grant humanitarian assistance on the one hand against the assessment of security risks on the other, whenever information on such risks is available.³¹¹ The court also noted that the petitioner could exit Gaza to Egypt or Jordan for medical treatment there or exit from Egypt or Jordan to a third country.³¹²

307. HCJ 1912/08 PHRI v. IDF Commander in Gaza (Apr. 16, 2008), Nevo Legal Database (by subscription) (Isr.).

308. *Id.* ¶ 7.

309. *See generally*, HCJ 7730/06 PHRI v. IDF Commander in Gaza (Sep. 27, 2006), Nevo Legal Database (by subscription) (Isr.) (dealing with expenses relating to security guards demanded by Israel); HCJ 4920/06 PHRI v. The Commander of the IDF Forces in the West Bank (June 25, 2006), Nevo Legal Database (by subscription) (Isr.) (dealing with expenses relating to security guards demanded by Israel).

310. HCJ 1912/08 PHRI v. IDF Commander in Gaza (Apr. 16, 2008), ¶ 7, Nevo Legal Database (by subscription) (Isr.).

311. *Id.*

312. *Id.*

Another case dealt with eleven Gaza residents who had not been allowed to exit Gaza to enter Israel for medical treatment.³¹³ During the hearings, the state announced that some would be allowed to exit through Egypt instead.³¹⁴ The petitioners again argued for a duty of the state and the state argued it had no duties in this regard.³¹⁵ The HCJ said it would not enter the legal question of Gaza's status since it was doubtful that this consideration could be helpful regarding humanitarian issues, and suggested that the state reconsider its decision so as to allow medical treatment while minimizing security risks.³¹⁶ The HCJ kept the case open until the state eventually reported that six petitioners had entered Israel; one is in a Hamas prison, one was hospitalized in Gaza, one was awaiting a visa to Egypt, one had died, and one had entered Egypt.³¹⁷ The HCJ then held that the case had been exhausted.³¹⁸

In another case, and based on information provided by the army, the HCJ accepted that there was a linkage between the petitioners seeking medical treatment and terrorist groups.³¹⁹ The HCJ therefore "recommended" that the state transfer the petitioners to medical centers in Jordan in a security escorted ambulance, given that passage to Egypt was closed from the Egyptian side at the time.³²⁰

The Israeli authorities specifically noted in other hearings as well that Palestinians have no right to enter Israel and Israel holds no legal responsibility for events in Gaza.³²¹ Nevertheless, Israel does coordinate with the Palestinian authorities the allocation of permits to enter or pass through Israel for medical purposes in cases involving life-saving situations, and a significant number of such permits have been granted.³²² The HCJ also noted that distinguishing between life-saving and

313. HCJ 9522/07 PHRI v. IDF Southern Command (Decision from Nov. 28, 2007), Nevo Legal Database (by subscription) (Isr.).

314. *Id.* ¶ b.

315. *Id.* ¶ c(3).

316. *Id.* ¶ d.

317. HCJ 9522/07 PHRI v. IDF Southern Command (Judgment from Feb. 12, 2008), Nevo Legal Database (by subscription) (Isr.).

318. *Id.*

319. HCJ 5786/07 PHRI v. IDF Commander in The Gaza Strip (July 2, 2007), Nevo Legal Database (by subscription) (Isr.).

320. *Id.*

321. HCJ 5429/07 PHRI v. Minister of Defense, (June 20, 2007), ¶ b, Nevo Legal Database (by subscription) (Isr.).

322. GROSS, *supra* note 4, at 230.

quality of life treatments (which may include saving a patient's eyesight or a limb) may at times be hard, and cases must be examined individually.³²³ The HCJ again held here that, given the urgency of the request, it would not enter into questions touching on the status of Gaza and of Israel's legal duties or lack thereof, even if they had come up in the parties' submissions.³²⁴ Instead, the HCJ, said it would limit itself to the "operative common denominator, that is, to the humanitarian aspects by virtue of which the state too is ready to treat patients who require urgent life-saving medical treatment."³²⁵ This case is one of many where the HCJ avoided any determination on duties and took the supposedly pragmatic course which resulted in helping some but came too late for at least one. Another one of these cases dealt with Gaza residents who wanted to enter Israel, some for medical treatment and others for passage to Jordan and Egypt.³²⁶ While some petitioners were allowed entry while the petition was pending, others were denied permits on security grounds.³²⁷ After examining secret documents presented by the state and given the army's insistence on security risks, the HCJ decided to abstain from intervention, even though some of the petitioners were clearly in need of urgent medical treatment.³²⁸ Israel said it would allow their exit to Egypt when passage from Gaza to Egypt (closed at the time) reopened or, failing that, would consider allowing exit to Jordan.³²⁹

Another refusal occurred in a 2016 decision concerning a petitioner who suffered from a heart problem. He asked to enter the West Bank through Israel or to enter Israel to have an isotopic heart scan at an Israeli hospital.³³⁰ A medical opinion handed to the court on the petitioner's behalf determined that failure to perform the scan would put the petitioner at unnecessary risk.³³¹ The respondents argued that the petitioner

323. HCJ 5429/07 PHRI v. Minister of Defense, (June 20, 2007), ¶ f(5)(b), Nevo Legal Database (by subscription) (Isr.).

324. *Id.* ¶ b.

325. *Id.*

326. HCJ 11105/07 PHRI v. IDF Commander in Gaza (Jan. 8, 2008), Nevo Legal Database (by subscription) (Isr.).

327. *Id.* ¶¶ 2–6.

328. *Id.* ¶¶ 6–7.

329. *Id.*

330. HCJ 3225/16 Muhamad Maslem v. IDF Southern Command (July 14, 2016), Nevo Legal Database (by subscription) (Isr.).

331. *Id.* ¶ 1.

had participated in terrorist activities in the past and was in contact with terrorist operatives, and refused him the permit.³³² The HCJ rejected the petition and held that the “balance” struck by the respondent had not been unreasonable.³³³ Failure to perform the examination would not put the petitioner in mortal danger, and catheterization, for which the patient had been referred originally, was available in Gaza.³³⁴ Deputy Chief Justice Rubinstein suggested in a dissenting opinion that, since this is a medical subject involving potential risks, a cardiologist attesting for the respondents should issue an opinion on the abstention from the examination.³³⁵ The majority justices, however, held that the medical opinion submitted by the petitioner, which had not been disputed by the army, made this action superfluous.³³⁶ This case again reflects the trumping nature of security arguments.³³⁷

One rare instance of PHRI successfully overturning alleged security considerations dealt with a Gaza resident suffering from colorectal cancer.³³⁸ The PA referred her for treatment at Makassed Hospital and later at Hadassah Hospital in Israel.³³⁹ The frequent treatments began at the end of June 2016.³⁴⁰ In October 2016, the state refused to allow the patient to attend additional treatments at Hadassah claiming security reasons.³⁴¹ PHRI then filed a petition on behalf of the patient at the Beer Sheva Administrative Court.³⁴² The Court was asked to allow the petitioner to enter Hadassah or Makassed hospitals for urgent medical treatments that are not available in Gaza.³⁴³ The petition claimed that, without those treatments, her situation could deteriorate and that waiting for treatment would involve unnecessary suffering.³⁴⁴ The petition was finally erased on the

332. *Id.* ¶ 1.

333. *Id.* ¶ 3.

334. *Id.* ¶ 3.

335. *Id.* ¶ 3.

336. HCJ 3225/16 Muhamad Maslem v. IDF Southern Command (July 14, 2016), ¶ 4, Nevo Legal Database (by subscription) (Isr.).

337. *Id.*

338. *See* Marfat Hassuna v. IDF Southern Command, 47821-11-16 (Beer Sheva) (Nov. 27, 2016) Nevo Legal Database (by subscription, in Hebrew) (Isr.).

339. *Id.* ¶ 2.

340. *Id.* ¶ 5.

341. *Id.* ¶ 6.

342. *Id.*

343. *Id.* ¶ 70.

344. Marfat Hassuna v. IDF Southern Command, 47821-11-16 (Beer Sheva) (Nov. 27, 2016), ¶ 7, Nevo Legal Database (by subscription, in Hebrew) (Isr.).

morning of the hearing due to the state's consent to allow the petitioner's entry.³⁴⁵ The state was also required to pay the petitioner's damages.³⁴⁶

Current Israeli military orders on exit from Gaza to Israel thus determine that, barring security grounds, requests will be approved in medical cases. The procedure also includes a mechanism for reconsideration upon request.³⁴⁷ The "permits status" document issued in 2016 lists the medical-related reasons that residents of Gaza can adduce in requests to enter Israel: (1) the need for life-saving treatment (or one without which the nature of life "totally changes") that is unavailable in Gaza, to be provided in Israel, the West Bank, or abroad, (2) professional training and specialization in hospitals in Israel or the West Bank that can strengthen medical services given to Gaza residents in cases of risk to life or ones without which the nature of life "totally changes," (3) visiting a first-degree family member who is seriously ill with a disease that is life-risking or requires long hospitalization (in Israel, the West Bank, or abroad), (4) specialized organized tours for sick children and children with special needs.³⁴⁸ The same document also allows West Bank residents to enter Gaza for exceptional humanitarian reasons—visiting a first-degree family member seriously ill with a disease that may be life-threatening or requires long hospitalization.³⁴⁹ Health issues, then, are subject to the same apparatus of bureaucratic occupation that Palestinians are subjected to generally—one that judicial review may have helped to create.

Testimonies from June 2017 indicate that the PA had been blocking the exit of patients from Gaza for medical treatment for two months, as part of the power struggle between the PA and Hamas.³⁵⁰ In July 2017, the Gazan Ministry of Health reported that a three-year-old girl was the sixteenth victim of "Ramallah's delays in providing approval and financial commitments for

345. *See id.*

346. *Id.*

347. THE COORDINATION AND LIAISON ADMINISTRATION TO THE GAZA STRIP (GAZA CLA), ISSUING PERMITS FOR GAZA RESIDENTS FOR MEDICAL TREATMENT (2014).

348. COGAT, *supra* note 295.

349. *Id.*

350. Jack Khoury, *Palestinian Authority Prevents Gazans From Leaving Strip for Urgent Medical Treatment in Israel*, HAARETZ (June 26, 2017), <http://www.haaretz.com/middle-east-news/.premium-1.797810>.

treatment in Israeli hospitals.”³⁵¹ The PA and the Ministry of Health in Ramallah denied claims of a change in policy, and blamed both Hamas and Israel for the situation.³⁵²

c. Summing Up: Exit Permits for Patients—Rights or Bureaucracy?

The bureaucratic mechanism described above creates various procedural problems, including difficulty accessing coordination and liaison authorities.³⁵³ A 2004 report described the complex bureaucracy involved in obtaining various kinds of permits for Palestinians who need to travel.³⁵⁴ The report mentioned disruptions in communication, arbitrariness, and lack of transparency, stressing the bureaucratic violence apparent in the waiting for a permit that may or may not come, the lack of information about the process, and the creation of a mechanism for controlling individuals asking for a permit without any discussion of rights.³⁵⁵ One example of a bureaucratic restriction, though no longer in force, affected displaced Palestinians who lived in Gaza but were not registered in the Israeli-controlled population registry and, in the past, had been prevented from applying for exit permits to Israel.³⁵⁶ At least in one case, this restriction led to the death of a cancer patient who could not obtain a permit despite repeated advocacy on her behalf.³⁵⁷ Although the army agreed in 2014 to cancel this restriction, the change came too late for her.³⁵⁸

Requiring permits for exit allows Israel to exercise great control over Palestinians. A PHRI report issued in 2015 points to technical and substantial failures in the conduct of the Israeli coordination and liaison authorities.³⁵⁹ Palestinian patients and

351. Jack Khoury, *Gaza Health Ministry: Toddler Died Because PA Delayed Medical Treatment in Israel*, HAARETZ (July 14, 2017), <http://www.haaretz.com/israel-news/1.801250>.

352. *Id.*

353. HCJ 2847/03 Alwana v. Commander of the IDF Forces in the West Bank (July 14, 2003), ¶ 26–28, Nevo Legal Database (by subscription) (Isr.).

354. PHRI, *THE DISENGAGEMENT FROM THE GAZA STRIP: PATIENTS PAY THE PRICE* (2005), www.phr.org.il/uploaded/26.9.05Report.pdf.

355. PHRI & MACHSOM WATCH, *THE BUREAUCRACY OF OCCUPATION: THE DISTRICT CIVIL LIAISONS OFFICE 50* (2004).

356. PHRI, *supra* note 354.

357. *Id.*

358. *Id.*

359. *Id.*

their companions must submit to security interrogations as a prerequisite for an exit permit for medical treatment.³⁶⁰ This practice was actually reviewed by the HCJ in a case where petitioners argued that the questioning, beyond relevant medical information, also seeks information about others and demands that permit seekers become collaborators.³⁶¹ The HCJ rejected this argument, relying on the security services' declaration that they do not use a person's illness for the purpose of attaining security information.³⁶² In 2015, however, for the very first time, an official Israeli representative made a statement supporting this claim.³⁶³

Security is clearly the overarching factor. A person who would otherwise meet the criteria can be denied a permit because she or he is considered to be a security risk. The basis for this category is hardly ever exposed to the patient (and, at best, is only given to the Court *ex parte*). This illustrates the one-sided nature of "security"—the Palestinians' security is not part of the security consideration, even though Palestinians may have humanitarian considerations on their side.³⁶⁴

A 2015 PHRI report also points to delays in checkpoints and to the rejection of exit permits applications that may lead to deterioration of the person's condition and to premature death.³⁶⁵ In 2014, PHRI recorded two cases of patients who died after being denied passage for medical treatment.³⁶⁶ During 2015, PHRI documented yet another case of a cancer patient residing in Gaza, who died after being denied passage to be treated at Ichilov Hospital in Tel Aviv.³⁶⁷ According to the 2015

360. See PHRI, *HOLDING HEALTH TO RANSOM: GSS INTERROGATION AND EXTORTION OF PALESTINIAN PATIENTS AT EREZ CROSSING* (2008).

361. HCJ 9522/07 PHRI v. IDF Southern Command, Nevo Legal Database (by subscription) (Isr.).

362. *Id.*

363. An Israeli TV channel published a conversation between the family of Abera Mengistu (an Israeli citizen held in the Gaza Strip) and Lior Lotan, the Prime Minister's representative for prisoners and missing persons. During that conversation, Lotan said: "When people, relatives of Hamas' big boys, senior people . . . When they wanted to enter Israel for medical treatment in Israel, we told them: 'No, bring us information on Abera.'" PHRI, *HARASSMENT OF PALESTINIAN PATIENTS APPLYING FOR EXIT PERMITS* 19 (2015).

364. On the "(Im)balance of Security" see GROSS, *supra* note 4, at 136–337. On the category of people whose entry is prevented based on "security" reasons, see BERDA, *THE BUREAUCRACY OF THE OCCUPATION*, *supra* note 76, at 133–63.

365. PHRI, *supra* note 255, at 23–25.

366. *Id.*

367. *Id.*

and 2016 reports, about twenty percent of the applications for exit permits were rejected.³⁶⁸ Almost half of these rejections were eventually overturned following PHRI's intervention, meaning that even the Israeli authorities ultimately decided they had been unfounded.³⁶⁹ In some of the other cases, referrals were diverted to Egyptian hospitals³⁷⁰—not an easy solution given the frequent closure of the Rafah crossing between Gaza and Egypt.

The report also discloses that, out of almost 300 cases that PHRI considered in 2014, about two-thirds were from Gaza and less than a third from the West Bank.³⁷¹ The gap was even bigger in 2016: 223 requests were received from the Gaza Strip compared to 20 from the West Bank.³⁷² Also worth noting is the increase in the number of requests PHRI received in 2015 from cancer and heart patients (68) whose applications for exit permits for medical treatment were denied or delayed.³⁷³ This figure represents an increase of more than one hundred percent over 2014 and may reflect a tougher policy on the transit of patients from Gaza,³⁷⁴ with the percentage of approvals of exit requests from Gaza dropping by thirteen percent.³⁷⁵ PHRI also pointed to a tougher policy concerning the transit of patients whose medical condition (even if not life-threatening) requires treatment unavailable where they live, and the passage of escorts accompanying patients.³⁷⁶ These changes underscore that access to health care for Palestinians is a function of a changing Israeli policy rather than a recognized human right, as indicated by the decreasing number of approved requests, with delays and refusals reportedly leading to twenty deaths of

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* For a detailed discussion of the referrals and permits system and of cases denied, see WORLD HEALTH ORGANIZATION, *supra* note 255. See also WHO, RIGHT TO HEALTH: CROSSING BARRIERS TO ACCESS HEALTH IN THE OCCUPIED PALESTINIAN TERRITORY (2013), http://www.emro.who.int/images/stories/palestine/documents/WHO-RTH_crossing_barriers_to_access_health.pdf?ua=1; WHO, BARRIERS TO HEALTH ACCESS IN THE OCCUPIED PALESTINIAN TERRITORY, 2011 and 2012 (2013), http://www.emro.who.int/images/stories/palestine/documents/WHO_Access_Report-March_5_2013.pdf.

372. PHRI, *supra* note 255, at 10.

373. *Id.*

374. *Id.* at 13.

375. *Id.* at 10.

376. *Id.* at 6.

Palestinians in Gaza.³⁷⁷

Overall, dependence on exit permits for health is part of the complex permits regime in the OPT.³⁷⁸ Shenhav and Berda, Israeli scholars, point out how the Israeli military administration in the West Bank uses uncertainty and ambiguity as a means of asserting authority and suppressing rebellion.³⁷⁹ Not knowing whether you will get a permit is part of that uncertainty. The permits regime, of which permits for health reasons are but a part, restricts freedom of movement and is one of the major aspects of Israel's excessive control over the

377. WHO surveys, based on data taken from the Palestinian District Coordination office, MoH-Gaza and the Palestinian General Authority for Civil Affairs in Ramallah, document Israel's responses to hundreds of thousands of permits requests filed by patients (and companions, in the West Bank) through the past six years. The surveys show that the overall approval rate of permits for West Bank patients and companions improved from 77.37% in 2014 to 83.18% in 2015. As for Israel's responses to permits requests to exit Gaza for medical reasons, from 92.5% approval rates in 2012, the numbers dropped to 76.66% and 63.8% in 2015 and 2016. In addition, Israel's approval of permits steadily declined during 2016, from a high of 78.2% in January to a low of 41.7% in December. In October 2017, 45% of the patient applications to access health care outside Gaza were rejected. 2017 is likely to see the lowest approval rate for patient applications to exit Gaza since the WHO began documenting them in 2006, with an average of only 54% accepted between January and October. A further increase relates to delayed cases, when patients were not allowed to leave for treatment on the scheduled dates.

The rate of unanswered applications for exit permits for medical treatment has nearly tripled over the past four years. According to the WHO, 15.4% of applications went unanswered in 2014, while in 2015 their number reached 17.6%. By September 2017, there were 8,555 applications that remained unanswered, accounting for 43.7% of nearly 20,000 applications. According to "Haaretz," 20 severely ill patients died in Gaza in 2017 after their application for an Israeli exit permit to receive medical treatment was not granted in time. Amira Hass, *For Some Gazans in Need of Medical Treatment, the Wait for an Exit Permit Ends in Death*, HAARETZ (Dec. 4, 2017), <https://www.haaretz.com/middle-east-news/palestinians/.premium-for-some-sick-gazans-the-wait-for-an-exit-permit-ends-in-death-1.5627529>.

WHO monthly reports on referral of patients from the Gaza Strip can be found online. WHO *Monthly Reports on Referral of Patients from the Gaza Strip*, WORLD HEALTH ORG., <http://www.emro.who.int/pse/publications-who/monthly-referral-reports.html>.

378. See BERDA, THE BUREAUCRACY OF THE OCCUPATION, *supra* note 76.

379. Yehouda Shenhav & Yael Berda, *The Colonial Foundations of the State of Exception: Juxtaposing the Israeli Occupation with Colonial Bureaucratic History*, in THE POWER OF INCLUSIVE EXCLUSION 337 (Adi Ophir, Michal Givoni & Sari Hanafi eds., 2009). See also Berda's discussion of administrative flexibility as part of what she calls "effective lack of efficiency," which is part of the creation of dependence among those governed by the occupation. BERDA, THE BUREAUCRACY OF THE OCCUPATION, *supra* note 76, at 110.

Palestinians' daily lives.³⁸⁰

d. Exit Permits: Medical Staff and Students

Cases dealing with exit permits affect the movement of medical teams too. Some of them are part of the problem noted above—the detachment of East Jerusalem from the West Bank. One early case dealt with the problems that hospitals in East Jerusalem confronted when a closure was imposed on the West Bank and the residents they employed could not reach them.³⁸¹ Following the petition, the state issued permits to essential workers, which led to the petition being rejected.³⁸² In another case, the HCJ rejected the petition of a Palestinian who had worked for fourteen years as a nurse in an East Jerusalem hospital.³⁸³ When his entry permit to Israel expired, the army refused to renew it for security reasons.³⁸⁴ After seeing the secret files provided by the General Security Services, the HCJ conveyed its negative impression from them to the petitioner, who withdrew the petition.³⁸⁵ Another case dealt with a medical student from Al-Quds University in the West Bank, who wanted to enter Israel for clinical studies and training at Makassed Hospital in East Jerusalem.³⁸⁶ The authorities refused him entry on security grounds and noted that, as in many other cases, decisions to allow entry are a privilege granted at the state's discretion.³⁸⁷ The HCJ, after reviewing the security documents *ex parte*, clarified to the petitioner that he was allegedly a member of a terrorist group, a fact that he denied.³⁸⁸ The HCJ rejected the petition, noting it would expect a person choosing

380. BERDA, *THE BUREAUCRACY OF THE OCCUPATION*, *supra* note 76, at 23–25, 57, 89.

381. HCJ 2054/96 Makassed v. Commander of the IDF Forces in the West Bank (Jan. 13, 1998), Nevo Legal Database (by subscription) (Isr.).

382. *Id.*

383. HCJ 10260/03 Shehadeh v. Commander of the IDF Forces in the West Bank (Mar. 1, 2004), Nevo Legal Database (by subscription) (Isr.).

384. *Id.*

385. *Id.* Similar issues came up in HCJ 0/103433 Zaban v. Commander of the IDF Forces in the West Bank (June 8, 2004), Nevo Legal Database (by subscription) (Isr.) and HCJ 6846/04 Alawna v. Commander of the IDF Forces in the West Bank (Aug. 30, 2004), Nevo Legal Database (by subscription) (Isr.). In these cases, however, entry was ultimately allowed.

386. HCJ 11595/05 Najar v. Commander of the IDF Forces in the West Bank (Dec. 17, 2005), Nevo Legal Database (by subscription) (Isr.).

387. *Id.* ¶ d(3).

388. *Id.* ¶ f.

the medical profession to avoid illegal acts and hoped for a solution but, absent one, it would not rush to intervene in the state's exercise of its privilege to decide who would enter.³⁸⁹ The HCJ rejected arguments founded on Israel's duties toward the local population (including health care under GCIV Article 56) and determined that the provision of medical services does not depend on any particular individual.³⁹⁰

Other HCJ decisions involving Gazans who requested permits to enter the West Bank reflect a further effect of the disengagement on health care, this time involving medical studies. The HCJ twice rejected the petition of a group of students who had received scholarships to study occupational therapy in the West Bank, a course that is not available in Gaza.³⁹¹ Israel classified individuals aged sixteen to thirty-five as a risk group and banned their entry into the West Bank even though, individually, they did not pose a security risk.³⁹² The state argued that, even if these students entered the West Bank without any intention of engaging in terrorist activities, they might be influenced by the surroundings.³⁹³ In its submission, the State distinguished between the Gaza Strip, no longer being under Israeli belligerent occupation, and the West Bank, an area that still was, with Israel holding overall responsibility for security.³⁹⁴ Israel refused to treat this as a humanitarian case and allow the students to enter even for the two months of clinical training needed to complete their degree, for which they had studied online.³⁹⁵ In another case, which involved students who wanted to move from the West Bank to pursue studies in Gaza, the HCJ upheld the army's decision based on its policy not to allow such moves except for humanitarian reasons.³⁹⁶ The HCJ noted that this position reflected Israel's wish to separate

389. *Id.* ¶ f(1).

390. *Id.* ¶ f(2). In another case, the HCJ upheld the army's refusal to let a delegation of PHRI staff enter Gaza due to security concerns, in which the HCJ chose not to intervene. HCJ 727/02 PHRI v. IDF Commander in The Gaza Strip (May 2, 2002), Nevo Legal Database (by subscription) (Isr.).

391. HCJ 11120/05 Hamdan v. IDF Head of Southern Command (Aug. 7, 2007), Nevo Legal Database (by subscription) (Isr.). The decision reaffirmed an earlier decision on the same matter. HCJ 7960/04 Alrazi v. IDF Commander in The Gaza Strip (Sept. 29, 2004), Nevo Legal Database (by subscription) (Isr.).

392. *Id.* ¶ h.

393. *Id.* ¶ h.

394. *Id.*

395. *Id.* ¶ j.

396. HCJ 495/12 Azat v. Minister of Defense (Sept. 24, 2012), Nevo Legal Database (by subscription) (Isr.).

the West Bank, controlled by the PA, from the Gaza Strip, controlled by a terrorist group.³⁹⁷ The state outlined to the Court its policy that the law of belligerent occupation no longer applies in Gaza and, therefore, Israel bears only humanitarian duties toward its population.³⁹⁸ This argument again illustrates how the disengagement allowed Israel to continue—and transform—its control without responsibility. The State still provided details from cases of entry into Israel from Gaza as well as entry into Gaza on grounds other than health care.³⁹⁹ While describing the situation as “almost desperate,”⁴⁰⁰ the HCJ rejected the petition; however, one of the three presiding judges opined in a dissent that the army should be mandated to establish a special “exceptions committee.”⁴⁰¹ Note that entering Israel is crucial not only for Gazans who need to do so for medical treatment or for study purposes,⁴⁰² but also for any Gaza resident who wishes to travel to the West Bank or to Jordan precisely for these reasons or for any other.

Seeing this question in the broader context of restrictions on freedom of movement, recall that, because of the closure imposed on Gaza’s airspace, any Gaza resident wanting to fly out from an Israeli or a Jordanian airport must pass through Israel. Given that the Rafah crossing to Egypt opened up only on a limited basis throughout most of the period discussed here, and given the distance between Gaza and Cairo that makes travel particularly challenging for sick people, the effect of the Israeli closure on Gaza residents has been significant. The situation is dynamic, with new rules issued frequently.⁴⁰³

397. *Id.* ¶ d.

398. *Id.*

399. *Id.* ¶ n.

400. *Id.* ¶ m.

401. *Id.* ¶ i.

402. The effect of Israel’s closure of Gaza on people wanting to travel is detailed in GISHA, *HELD BACK: STUDENTS TRAPPED IN GAZA* (2008), http://gisha.org/UserFiles/File/Students_report_Eng-Online_Version.pdf, and in GISHA, *OBSTACLE COURSE: STUDENTS DENIED EXIT FROM GAZA* (2009), http://www.gisha.org/UserFiles/File/publications_/Students2009_Report_Eng.pdf.

403. See COGAT, *supra* note 295 (discussing the rules issued by the Israeli army regarding the movement of Gaza residents, specifically, Israel’s announcement in 2016 that it will allow Gaza residents to exit for personal reasons providing they do not return via Israel for at least a full year).

III. THE PROTECTION OF CIVILIANS AND MEDICAL TEAMS DURING MILITARY OPERATIONS

The second major category of cases discussed by the HCJ regarding the right to health of Palestinians in the OPT concerns the protection of civilians and of medical teams wishing to assist Palestinians at the time of hostilities. These cases were litigated in real time, and the Israeli Supreme Court took what can be described as a “managerial” position, reiterating the applicable norms of IHL and mostly hearing from both sides, while obtaining guarantees from the army about its actions and trying to improve the situation on the ground. Some of these cases dealt with the possibility of access for medical teams and the evacuation of wounded people, with the army guaranteeing it would abide by its IHL duties. The cases again follow the political developments, this time the rounds of heightened hostilities in the OPT since the early 2000s.⁴⁰⁴

During the 2002 Israeli army operation in Jenin known as “Defensive Shield,” PHRI petitioned the HCJ. In response, the army declared it was abiding by IHL and consequently, the parties agreed to withdraw the petition.⁴⁰⁵ Several weeks later, as hostilities continued, two more cases brought by PHRI came before the HCJ, with the Israeli army allegedly firing on Red Crescent ambulances.⁴⁰⁶ In its response, the State conceded that the “objective situation regarding treatment of wounded people”⁴⁰⁷ was not easy and that shots had been fired at a Palestinian ambulance.⁴⁰⁸ However, the army claimed that Palestinians had previously transferred explosives in ambulances.⁴⁰⁹

404. See ZIV, *supra* note 6, at 57–63.

405. HCJ 1985/02 PHRI v. The Commander of the IDF Forces in the West Bank (Mar. 5, 2002), Nevo Legal Database (by subscription) (Isr.).

406. HCJ 2117/02 PHRI v. The Commander of the IDF Forces in the West Bank (Apr. 28, 2002), Nevo Legal Database (by subscription) (Isr.); HCJ 2936/02 PHRI v. Commander of the IDF Forces in the West Bank (Apr. 8, 2002), Nevo Legal Database (by subscription) (Isr.).

407. HCJ 2117/02 PHRI v. Commander of the IDF Forces in the West Bank (Apr. 28, 2002), ¶ 1, Nevo Legal Database (by subscription) (Isr.).

408. *Id.* ¶ 4.

409. *Id.* ¶¶ 2, 4.

The State argued the army was nevertheless committed to abide by its obligations under international law and had instructed all warring forces to act accordingly.⁴¹⁰ In one of these cases, the HCJ noted that, given the army's declaration of its commitment to humanitarian rules and the instructions to the soldiers to abide by them, the petition could be rejected.⁴¹¹ As for the second case, the HCJ found that the petition was "forward looking."⁴¹² It cited the First Geneva Convention, which deals with the amelioration of conditions for the wounded and the sick among armed forces in the field,⁴¹³ rather than GCIV, thus presumably turning this into a matter related to armed forces rather than civilians. This choice raises a host of questions about the classification and status of Palestinian combatants. Although, these are beyond the scope of this paper, it is beneficial to discuss them briefly. Specifically, the HCJ cited Articles 19, 21, 24, and 26 of the First Geneva Convention, which prohibit attacks on fixed or mobile medical units.⁴¹⁴ The HCJ noted that Article 24 deals with the respect due to medical personnel "exclusively" engaged in the search of or the collection, transport, or treatment of the wounded or sick and in other medical roles.⁴¹⁵ It also cited Article 21, which determines that the protection to which medical units are entitled may cease if they are used to commit, outside their humanitarian duties, acts harmful to the enemy, but only after due warning has been given, after granting reasonable time for compliance, and after such warning has remained unheeded.⁴¹⁶ Citing this background, the HCJ reiterated its determination in the first of the two twin cases, whereby abuses of medical teams by Palestinians may require the Israeli army to prevent such activities but does not allow broad violation of humanitarian rules.⁴¹⁷ The HCJ emphasized that concrete instructions should be issued to and complied with by the combatting forces to show commitment to humanitarian rules, and they should be

410. *Id.*

411. HCJ 2936/02 PHRI v. Commander of the IDF Forces in the West Bank (Apr. 8, 2002), ¶¶ 4–5, Nevo Legal Database (by subscription) (Isr.).

412. HCJ 2117/02 PHRI v. Commander of the IDF Forces in the West Bank (Apr. 28, 2002), ¶ 5, Nevo Legal Database (by subscription) (Isr.).

413. *Id.* ¶ 6.

414. *Id.* ¶ 6–8.

415. *Id.* ¶ 7.

416. *Id.* ¶ 8.

417. HCJ 2117/02 PHRI v. Commander of the IDF Forces in the West Bank (Apr. 28, 2002), ¶ 9, Nevo Legal Database (by subscription) (Isr.).

“balanced” against the risks posed by the Palestinians who, according to the Israeli army, are involved in combat while disguised as medical teams.⁴¹⁸

The HCJ again confronted the issue of medical teams during Israel’s military activity in Rafah in 2004. Various human rights groups, spearheaded by PHRI, demanded that the army allow medical teams and ambulances to evacuate people who had been wounded in Rafah.⁴¹⁹ They demanded that the evacuation be conducted without need for prior coordination with a “humanitarian hotline” established by the army, that the movement of medical equipment between Rafah and hospitals outside it be allowed and medical teams or civilians who evacuate the wounded or the dead not be hurt or threatened.⁴²⁰ They also demanded that supplies of electricity, water, food, and medicine be renewed to certain areas, and that a delegation of physicians on behalf of PHRI be allowed to visit Gaza hospitals.⁴²¹ The army argued that, since the litigation was being conducted while hostilities were still ongoing, the HCJ should beware of intervening, as the issue could hardly be considered justiciable.⁴²² The army explained that the purpose of the operation was to prevent terrorism and these cases were difficult as terrorists operate amidst a civilian population.⁴²³ In its judgment, the HCJ emphasized that all the army’s combat activities are subject to the pertinent rules of international law.⁴²⁴ It also stressed that, although judicial review is usually conducted *ex post factum*, in this case the judicial review requested is *ex ante*, while hostilities are taking place.⁴²⁵ The HCJ determined that the relevant normative framework for its decision includes the Hague Convention, the GCIV, and principles of Israeli administrative law binding on all Israeli soldiers.⁴²⁶ It cited provisions regarding respect for protected persons,⁴²⁷ and GCIV articles dealing with the supply of food,

418. *Id.*

419. HCJ 4764/04 PHRI v. Commander of the IDF Forces in Gaza (May 30, 2004), ¶ 4, Nevo Legal Database (by subscription) (Isr.).

420. *Id.*

421. *Id.*

422. *Id.* ¶ 5.

423. *Id.* ¶ 5.

424. *Id.* ¶ 7.

425. HCJ 4764/04 PHRI v. Commander of the IDF Forces in Gaza (May 30, 2004), ¶ 8, Nevo Legal Database (by subscription) (Isr.).

426. *Id.* ¶ 11.

427. *Id.*

medicine, and consignments as well as the operation of medical bodies in the area.⁴²⁸ Addressing the petitioners' specific claims, the HCJ said it had requested and received answers from the army on all the issues that had been raised. Among the answers, the HCJ cited:

Medical equipment and drugs: The petitioners had argued that the relevant hospital suffered from a serious shortage of medications, medical equipment, and blood.⁴²⁹ A car with equipment and supplies prepared by PHRI had not been allowed to enter the area.⁴³⁰ In its answer, the army noted that medical equipment and drugs are regularly allowed to enter, describing detailed discussions conducted with the director of the hospital, who had reported that blood supplies were no longer lacking but the shortage of first aid equipment continued.⁴³¹ The army conveyed that Red Cross trucks had entered the area with medications and four trucks with medical equipment had "just" passed an Israeli crossing.⁴³² After this account, the HCJ stated it was the duty of the military commander to guarantee the availability of medical equipment in the area and to ensure the ability of local hospitals to treat patients.⁴³³ Medical equipment should be prepared in advance for a situation of shortage and allowed to enter the area from various sources. If possible, the HCJ added, the army and local medical services should remain in regular contact.⁴³⁴ These are duties of the military commander, and no external agency can relieve him from them. The HCJ then noted that, based on the facts presented, this issue appears to be resolved now, leaving no room for judicial intervention.⁴³⁵

Evacuation of injured people: The petitioners argued that roads to Rafah were blocked and ambulance movement was restricted.⁴³⁶ The army answered that it allows the entry of ambulances and medical teams in coordination with various bodies, arguing that some restrictions had been required because terrorists had in the past used ambulances to transfer

428. *Id.* ¶ 12.

429. *Id.* ¶ 17.

430. *Id.* ¶ 17.

431. HCJ 4764/04 PHRI v. Commander of the IDF Forces in Gaza (May 30, 2004), ¶ 17, Nevo Legal Database (by subscription) (Isr.).

432. *Id.*

433. *Id.* ¶ 18.

434. *Id.*

435. *Id.*

436. *Id.* ¶ 21.

combatants and weapons.⁴³⁷ Checking ambulances was thus required, but the cost is a delay of only a few minutes and the instruction is to refrain from shooting at ambulances.⁴³⁸ The HCJ then stated that the normative aspect is not contested and that the army must do everything possible to allow the evacuation of wounded local residents.⁴³⁹ It also held that the transfer of ambulances to Rafah and back had seemed proper, instructions had been clear and unequivocal, and the petition had been satisfied.⁴⁴⁰

Visits of medical teams: The army replied there were no restrictions on physicians' visits, no matter if they were from the ICRC, or were non-Israelis working in Israeli hospitals or in the West Bank and Gaza.⁴⁴¹ Israeli doctors were not allowed in Gaza (by Israel) given the risk to their security.⁴⁴² The HCJ held that the army was solely guided by security considerations about the risks to Israelis in Gaza.⁴⁴³

In sum, the HCJ held that military actions in accordance with IHL requires the reiteration of rules of behavior and the creation of institutional tools to enable their fulfillment.⁴⁴⁴ It remarked that, compared to the cases addressed two years previously (cited above) much progress had seemingly been made.⁴⁴⁵ The Court emphasized that the army played not only a "negative" role but also a "positive" one—protecting the local residents.⁴⁴⁶ Accordingly, military procedures must also help to solve new problems that may arise. The HCJ favorably noted that the army would appoint a senior officer who would be in direct contact with the petitioning non-governmental organizations.⁴⁴⁷

The third and so far last round of judgments issued during hostilities dates back to 2009, during the "Cast Lead" Israeli operation in Gaza. PHRI and other non-governmental

437. HCJ 4764/04 PHRI v. Commander of the IDF Forces in Gaza (May 30, 2004), ¶ 22, Nevo Legal Database (by subscription) (Isr.).

438. *Id.* ¶ 22.

439. *Id.* ¶ 23.

440. *Id.* ¶¶ 21–23.

441. *Id.* ¶ 32.

442. *Id.* ¶ 32.

443. HCJ 4764/04 PHRI v. Commander of the IDF Forces in Gaza (May 30, 2004), ¶¶ 31–33, Nevo Legal Database (by subscription) (Isr.).

444. *Id.* ¶ 34.

445. *Id.*

446. *Id.* ¶ 35.

447. *Id.* ¶ 37.

organizations petitioned the HCJ to protest delays in the evacuation of the injured from Gaza to hospitals, Israeli army attacks on ambulances and medical teams, and the lack of electricity in Gaza that undermined the functioning of hospitals, clinics, and the water and sewage systems.⁴⁴⁸ The army, after repeating its previous arguments regarding justiciability, noted it had abided by IHL and had fulfilled its duties as held in the Rafah case.⁴⁴⁹ It also noted, however, that Israel was no longer occupying Gaza and did not have a military commander in the area or any contact with the Hamas regime.⁴⁵⁰ Humanitarian coordination is arranged vis-à-vis international groups and the Palestinian civil committee in Ramallah.⁴⁵¹ The army also described the operational layout it had established to allow for humanitarian assistance,⁴⁵² and it noted that an order was in place to avoid attacking medical teams fulfilling their roles unless it was known they were being abused for combat.⁴⁵³

The HCJ reiterated its statement on judicial review from previous cases, noting the difficulty of collecting reliable data while belligerencies continue. In such cases, it said, the Court's judicial review focused on sustaining the applicable international legal norms and those from Israeli administrative law.⁴⁵⁴ It cited the normative framework of armed conflict, leaving open (as it had in some of the exit permit cases discussed above) the question of the relevance of occupation law to Gaza and naming sources similar to those cited in previous cases.⁴⁵⁵ After considering the army's description of the humanitarian apparatus it had set up, the HCJ said it hoped it would fulfill the army's duties under IHL, which the army had not denied.⁴⁵⁶ The HCJ was also satisfied that the army had tried to fix the problems affecting the supply of electricity, food, and

448. HCJ 201/09 PHRI & Gisha - Legal Center for Freedom of Movement v. Prime Minister and Minister of Defense (Jan. 19, 2009), ¶¶ 5–6, Nevo Legal Database (by subscription) (Isr.).

449. *Id.* ¶ 7.

450. *Id.*

451. *Id.*

452. *Id.* ¶ 8.

453. *Id.* ¶ 9.

454. HCJ 201/09 PHRI & Gisha - Legal Center for Freedom of Movement v. Prime Minister and Minister of Defense (Jan. 19, 2009), ¶ 13, Nevo Legal Database (by subscription) (Isr.).

455. *Id.* ¶¶ 14–21 (citing to GCIV arts. 16, 18–26, 30 and AP1 arts. 8, 12–16, 70).

456. *Id.* ¶¶ 22–23.

medicine.⁴⁵⁷

Empirical studies exceeding the scope of this article are needed to discern how much the litigation in all these cases affected reality on the ground. Except for the question of whether duties incumbent on the occupier continue to apply in Gaza, there was no controversy in these cases concerning the applicable norms on the one hand, and the “facts” on the ground while litigation was ongoing on the other. The role of the HCJ, in its own perception, was limited to declaring the norms while encouraging the army to act toward their implementation and ease humanitarian relief under its aegis.⁴⁵⁸ These cases raise complex questions about the role of the HCJ in these situations: Is it ameliorative? Does it force the army to recall IHL duties it would have neglected otherwise? To what extent are the letter and spirit of IHL duties preserved in reality, given the many reports of violations, and what role, if any, did the HCJ determination play on effecting this?

No petitions were submitted to the HCJ during the latest round of hostilities in Gaza in 2014, even if attacks on medical personnel and medical facilities, including hospitals, were reported. Reports on the 2014 conflict also pointed to the failure of the coordination mechanism for injured people, which sometimes took ten hours instead of ten minutes and, in some cases, took seven or eight days or failed altogether.⁴⁵⁹ These reports of violations in the most recent round do raise questions about the effect of the litigation in previous rounds on army policies

IV. CONCLUSIONS

The litigation concerning the right to health in the OPT brings up questions very different from those raised in domestic litigation. This litigation has mostly dealt with physical access to health care and with the problems resulting from restrictions on freedom of movement within and outside the OPT, while some cases have focused on protection during hostilities. A great deal of litigation that was not specifically focused on access, however, is relevant to matters affecting health care. These matters

457. *Id.* ¶ 26.

458. *Id.* ¶ 7.

459. JUTTA BACHMANN ET AL., GAZA 2014: FINDINGS OF INDEPENDENT MEDICAL FACT-FINDING MISSION 44–51 (2014).

include, for example, allowing Israel to reduce the supply of electricity and fuel to Gaza to the humanitarian minimum,⁴⁶⁰ the rights of Palestinian prisoners and forced feeding of hunger strikers,⁴⁶¹ and extensive individual litigation about who is considered a “resident” of East Jerusalem and hence of Israel, consequently entitled to access to Israel’s National Health Insurance.⁴⁶² Often, this litigation did not result in a court judgment but in some sort of ad hoc response, frequently in the form of an out-of-court settlement.

The HCJ has tended to elude questions of principle, especially regarding the status of Gaza and Israel’s duties in its regard, favoring instead pragmatic solutions. As noted in the cases concerning the checkpoints and the wall, the HCJ refused to endorse an overall perspective, such as the one adopted by the ICJ, and addressed only local, specific cases, even when providing a localized remedy, thereby legitimizing the regime as such.⁴⁶³ Litigation before the HCJ concerning exit permits seems to have played a significant role in the shaping of the army’s procedures, especially regarding the West Bank, probably because this was the one area where the HCJ did agree to deal with a general petition. The result was the bureaucratic permits regime discussed above. Regarding post-disengagement Gaza, the picture is different because the HCJ has generally accepted the position that Israel does not have the duties of an occupier towards its residents. Although in many of these cases the HCJ

460. See, e.g., HCJ 4258/08 Gisha Legal Center for Freedom of Movement v. Minister of Defense (June 5, 2008), (Isr.); HCJ 07/9132 Al-Bassiouni v. Prime Minister and Defense Minister of Israel (Jan. 30, 2008), (Isr.). The continuing electricity crisis in the Gaza Strip, fueled by disagreements between Hamas and the PA and a lack of any operative steps taken by Israel on the matter, has led to eighteen to twenty-hour power cuts a day, placing an increasing burden on health facilities in Gaza. Electricity fluctuations have damaged medical equipment, with over 150 medical machines currently out of order. The electricity crisis is also affecting acceptable standards for collecting, storing, and transporting blood. With funding from the Central Emergency Relief Fund (CERF) and other donors, life-saving services have been maintained. See WORLD HEALTH ORGANIZATION, WHO SPECIAL SITUATION REPORT GAZA, OCCUPIED PALESTINIAN TERRITORY OCTOBER TO NOVEMBER (2017).

461. See, e.g., HCJ 452/16 Al-Kik v. Commander of IDF Forces in the West Bank (Feb. 16, 2016), (Isr.); HCJ 7837/04 Adalah v. Prison Service & the Minister of Public Security (Sep. 14, 2004), (Isr.).

462. See, e.g., Labor Court (Jer.) 98/1241 Samar Abu-Sanina v. Social Security – Jerusalem (Aug. 27, 2002), (Isr.); Labor Court Appeal 1394/02 Samar Abu-Sanina v. Social Security (Mar. 16, 2004), (Isr.); Civil Request (Jer.) 1280/06 Zahada Hussina v. Social Security (Apr. 6, 2006) (Isr.).

463. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* (2002); Shamir, *supra* note 196.

said it would sidestep issues of principle on the status of Gaza and Israel's duties, it did, in fact, adopt the state's position,⁴⁶⁴ while still attempting to prod the state to adopt measures based on humanitarian grounds rather than on rights or duties.

In cases concerning hostilities, the HCJ cited the overarching applicable norms from IHL usually missing from the freedom of movement cases, but at times declaring norms more than actually examining the scope of their implementation. This approach can be understood in a wider context—given Israel's denial of the applicability of GCIV to the OPT and the HCJ's doubts about its enforceability,⁴⁶⁵ the HCJ finds it easier to address IHL norms on belligerency than norms on occupation. Although the HCJ does often engage with the law of occupation, it does so more easily with the Hague Regulations than with the Geneva Convention, perhaps clarifying the latter's disappearance from most of the cases that bring up health duties as an occupier rather than as a belligerent party.

The notion of access to health care that was developed in international human rights law is relevant in these cases, and the HCJ determined that human rights law applies in the OPT alongside IHL. Nevertheless, the HCJ never turned to international human rights law on the right to health in such cases, although occasionally referred to the right to health generally and without citing specific sources. The content of the right to health as outlined above, focusing on accessibility as a significant component, could and should have highlighted the effect of physical restrictions on the violation of this right. Moreover, even when applying IHL, the HCJ hardly turned to specific norms within it, although it did so in cases of protection during hostilities. The disappearance of international human rights considerations, including the limited turn to IHL, points to the prevalent form of analysis, especially in the Gaza cases. This analysis hinges on humanitarianism, in the sense of humanitarian gestures rather than of binding obligations derived from IHL, instead of on rights and duties. Law is more often absent than present, and the HCJ seems to favor pragmatic solutions, or no solution at all, rather than holdings based on principles.

464. HCJ 07/9132 Al-Bassiouni v. Prime Minister and Defense Minister of Israel (Jan. 30, 2008), (Isr.) (adopting this position generally regarding Gaza).

465. See KRETZMER, *supra* note 463; GROSS, *supra* note 4.

The issues usually raised in courts where health rights are litigated did not feature in the cases before the HCJ reviewed here, probably because they do not pertain to the Israeli authorities but to Palestinian (and international) bodies providing health care in the OPT. Nor have the occupation's more subtle detrimental effects on health care been a subject of litigation. These effects touch on the social and economic conditions created by the occupation and their long-term effect, but also on the violence of the occupation. Other issues that did become the subject of litigation—such as the legitimacy of the types of weapons used by Israel,⁴⁶⁶ or of “targeted killings” and their collateral effect,⁴⁶⁷ have a bearing on the life and health of Palestinians in the OPT, who may die or be injured because of these policies. Focusing on access to health care, then, as this Article did here, tells only a small part of the story of occupation, law, and health. Indeed, adjudication dealing with the conduct of hostilities in the OPT, even beyond that directly touching on the protection of medical teams and provisions of medical treatment, is no less relevant to the health of Palestinians living under occupation.

But even regarding access to health care, we should acknowledge the limits of studying it through litigation. Paul Farmer points to the need for rethinking health and human rights in a way that will not pin all the hopes on legal battles and will instead shift to a paradigm of political solidarity and, pragmatically, to the provision of services for those in need.⁴⁶⁸ Farmer says that a real transfer of money, food, and drugs is needed, rather than more litigation.⁴⁶⁹ In the present case, this

466. HCJ 8990/02 PHRI v. IDF Southern Command (Apr. 27, 2003), (Isr.) (concerning the legality of using flechette guns).

467. HCJ 769/02 Public Committee Against Torture in Isr. v. Israel (Dec. 14, 2006), (Isr.).

468. PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* 213 (2003).

469. *Id.* See also Paul Farmer & Nicole Gastineau, *Rethinking Health and Human Rights: Time for a Paradigm Shift*, 30 J.L. MED. & ETHICS 655–66 (2002). For other sources on the limits of right to health litigation when bigger problems are involved, see Lucie White, “If You Don’t Pay, You Die”: *On Death and Desire in the Postcolony*, in *EXPLORING SOCIAL RIGHTS* 57, 72 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007). See generally Jeremy Perelman & Lucie E. White, *Stones of Hope: Experience and Theory in African Economic and Social Rights Activism*, in *STONES OF HOPE* 149–71 (2011) (discussing robust social rights practice that uses litigation but does not privilege it and engages multiple public actors in every domain of state power, including both private and state actors).

approach also pertains to the gap between the Palestinian and Israeli health systems as well as to the structural gaps (or, in Farmer's term, the structural violence) at the heart of the issue.⁴⁷⁰ In Farmer's words, human rights violations are not accidents but symptoms of deeper pathologies of power, and they are intimately linked to the social conditions that so often determine who will suffer abuse and who will be shielded from harm.⁴⁷¹ Another factor to consider when addressing the limits of a litigation perspective is access to justice. Lack of access to the legal system or to lawyers, for reasons such as knowledge, means, and others, may indicate that litigation presents only part of the problem, without covering those who did not make it even to the threshold of the law.

Haaretz journalist Amira Hass, who has documented the effects of restrictions on freedom of movement and their effect on health care,⁴⁷² noted that Israeli authorities use the term "humanitarian" to describe their intervention in a way that allows them to beg the more rigorous questions surrounding the suppression of human rights.⁴⁷³ As Eyal Weizman, a professor at the University of London, points out, "humanitarian" has become the most commonly used adjective in matters of occupation design, with the army using such terms as "humanitarian terminals" and "humanitarian officers" in reference to checkpoints.⁴⁷⁴ Weizman describes how, in recent decades, governments have begun to describe their own projects as "humanitarian" and to use the term in any connection related to the provision of aid, including medical aid, even when undertaken by military or state agencies.⁴⁷⁵ At first glance, this description aligns with David Kennedy's, a Harvard Law School professor, analysis of how, within humanitarian law, the humanitarians and the army often speak the same language,

470. FARMER, *supra* note 468, at 8–9, 230–31.

471. *Id.* at 7.

472. AMIRA HASS, *DRINKING THE SEA AT GAZA: DAYS AND NIGHTS IN A LAND UNDER SIEGE* 236–63 (1996).

473. Hass also noted that none of the refusals she documented had to do with security. *Id.* at 263.

474. EYAL WEIZMAN, *HOLLOW LAND: ISRAEL'S ARCHITECTURE OF OCCUPATION* 149–53 (2007). On the effects of degrading environmental conditions on water, hygiene, nutrition, and health care as potentially leading to preventable deaths that are not recorded when only deaths due to violence or hunger related causes are counted, see EYAL WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA* 86 (2012).

475. WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS*, *supra* note 474, at 51.

since modern humanitarian law provides a professional vocabulary about objectives and means that civilized people can use to discuss military violence.⁴⁷⁶ Military commanders and humanitarians, says Kennedy, assess acts of violence from a similar vantage point and thus reinforce one another's professionalism.⁴⁷⁷ Kennedy's analysis pertains to the place of humanitarian lawyers and advocates vis-à-vis the military.⁴⁷⁸ However, we should also note that while advocates for Palestinian health rights often use a language of rights, be they anchored in IHL or in international human rights law, many of the court judgments resort to a humanitarian language that is often "humanitarian without the law." Courts may adopt an IHL means-ends proportionality analysis that actually obscures the wider picture of structural violence, inequality, and domination. These questions have tended to remain outside the judicial realm, though their effect on the right to health in its fullest sense has been critical. These HCJ decisions share with the military the language of proportionality without attempting to look in-depth at the structure of the occupation and without questioning the nature and legitimacy of the army's concept of "security." This humanitarianism, to borrow Kennedy's analysis, participates in the occupation machine.⁴⁷⁹

Frequently, however, humanitarian is not used in its denotation in IHL but as in humanitarianism, i.e. action that is done out of humanitarian concern and not IHL duty. As presented throughout this Article, in many of the cases pertaining to the right to health of Palestinians in the OPT, the HCJ has hardly made any reference to this right as a human right in international law and rarely mentioned specific obligations under IHL. Israeli courts tend to deal with OPT

476. On the role of proportionality in humanitarianism, see DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* 235–323 (2005).

477. *Id.* at 266–68.

478. *See id.*

479. *See id.* at 316–23 (discussing humanitarian campaigns). For an understanding of various alleviations in the name of humanitarianism as part of the occupation regime in general and particularly of the barrier, see Ariella Azoulay & Adi Ophir, *The Monster's Tail*, in *AGAINST THE WALL* 2, 23 (Michael Sorkin ed., 2005). On the Israeli army's use of humanitarian discourse when dealing with checkpoints and the wall, see WEIZMAN, *HOLLOW LAND*, *supra* note 474, at 143–259, 174–75. *See also* WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS*, *supra* note 474, at 3–4 (discussing how humanitarianism, human rights, and IHL, when abused by the state, have become the crucial means by which the economy of violence is calculated and managed).

Palestinians' access to health care mainly as a humanitarian issue—again, not in the sense of binding obligations from IHL but in the sense of a humanitarian gesture—rather than as a matter raising questions of rights and duties. The humanitarianism of the army described by Hass and Weizmann seems to coalesce with the logic of these HCJ's judgments.

At the heart of the matter, then, is the occupation regime *per se*. Its health dimension reflects the larger structures of domination, the restrictions on freedom of movement, and the different regimes that populations living in the same area are subject to, including, in the present context, different health regimes. Israelis have access to the stronger Israeli health system, with the personal application of the NHIL to the settlers, and Palestinians in the OPT are excluded from it. Together with other factors, these circumstances lead to significant gaps between Israelis and Palestinians from the OPT in the health indicators and social determinants of health.⁴⁸⁰ Of course, the data for Israel includes Israeli settlers in the OPT whereas the data for the OPT applies only to the Palestinians.

A recent report from PHRI Israel, which detailed this data, argued that pointing only to Israel's specific responsibilities is no longer possible and full equality between Israelis and Palestinians must be demanded.⁴⁸¹ At the time of writing, however, we seem to be far from such equality, and the litigation described in this article proceeds against the background of this inequality. Behind the legal accounts are the human stories of people who suffered, and sometimes died, because they could not access medical care on time. These people find themselves between the bureaucracy of the occupation on one hand and "proportionality" analysis on the other, with only "humanitarianism" rather than rights on their side. Bureaucratic procedures and proportionality analysis share an image of professional decision-making but, underlying them, is a regime of structural violence. As key features of the access to

480. For example, the rate of infant mortality in the OPT is 18.8 per 1000 births v. 3.7 in Israel. EFRAT, *supra* note 16, at 3. The rate of maternal deaths is 28 per 100,000 in the OPT v. 7 in Israel. *Id.* Additionally, the average life expectancy in the OPT is about ten years lower than in Israel. *Id.* There are 1.6 times more doctors to serve the population in Israel than in the OPT and only 0.125 as many specialists in the OPT as in Israel. *Id.* at 3–4, 19–41. See generally Rita Giacaman et al., *Health Status and Health Services in the Occupied Palestinian Territory*, 373 LANCET 837 (Mar. 7, 2009) (providing additional health statistics in occupied Palestine).

481. EFRAT, *supra* note 16, at 5.

health care and the law regulating it, bureaucracy and proportionality together with “humanitarian” acts may help to improve the situation for many Palestinians, as evident in the high percentage of approvals for exit permits requests. However, as discussed above, this percentage has been dropping, with delays and refusals leading to death in some cases. This Article points to the very idea that Palestinians are dependent on the discretion of Israeli military bureaucracy and are subject to its failures, rather than being accorded the human right of access to health care and to freedom of movement. This very problem is the core issue that appears to be beyond what litigation can change.